Supreme Court, U.S.
FILED
941423 FEB 23 1995
OFFICE OF THE CLERK

No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

JOHN E. PELOZA,

*Petitioner,*

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT, *et al.*,

*Respondents.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

**KEITH A. FOURNIER**
The American Center for Law & Justice
1000 Regent Univ. Drive
Virginia Beach, VA 23467
(804) 579-2489

**WENDELL R. BIRD**
**DAVID J. MYERS**
Bird & Myers, P.C.
1150 Monarch Plaza
3414 Peachtree Road, NE
Atlanta, GA 30326
(404) 264-9400

**JAY ALAN SEKULOW** *
**JAMES M. HENDERSON, SR.**
**JOEL H. THORNTON**
The American Center for Law & Justice
1000 Thos. Jefferson St.
Suite 520
Washington, DC 20007
(202) 337-2273

**CYRUS ZAL**
Law Offices of Cyrus Zal
102 Mainsail Court
Folsom, CA 95630
(916) 985-3576

* *Counsel of Record*

*Attorneys for Petitioner*

111 pp

## QUESTIONS PRESENTED

A federal district court dismissed a public school teacher's federal civil rights and conspiracy suit. In so doing, the district court failed to accept as true the well-pled facts in the Complaint. In a divided panel decision affirming, the U. S. Court of Appeals for the Ninth Circuit rejected the merits of the teacher's free speech and establishment claims.

(1) Did the Ninth Circuit err in limiting a public school teacher's freedom of speech and academic freedom by analyzing Petitioner's right to freedom of speech under the public employee speech doctrine embodied in this Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968), in conflict with the U. S. Courts of Appeal for the First, Second, Sixth, Seventh, Tenth and Eleventh Circuits, rather than under this Court's "material and substantial disruption standard" for speech in public schools, embodied in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969)?

(2) Does a school board policy ordering a teacher not to answer questions from students about religion and not to discuss such matters with his students, at any time while on campus, violate the teacher's right to freedom of speech?

(3) Did the Ninth Circuit err in holding that "Establishment Clause concerns trump" a public school teacher's free speech right to candidly reply to questions posed by his students in or out of class?

(4) Did the Ninth Circuit err when it refused to accept as true the well-pled facts of the Petitioner's First Amendment Complaint in the face of a motion for dismissal brought under Fed. R. Civ. P. Rule 12(b)(6)?

## PARTIES

In addition to the parties listed in the caption of this Petition, the following parties participated in the proceeding in the court below: Board of Trustees of the Capistrano Unified School District, Paul B. Haseman, Crystal Kochendorfer, Marlene M. Draper, Annette B. Gude, Kathryn I. Itzel, E. G. Kopp, A. Edward Westberg, Jerome R. Thornsley, William D. Eller, Geraldine Jaffe, Thomas R. Anthony, Ross Velderraine, James Corbett, Paul Pflueger, Ray Panici, Tim Dunn, William Redding and Does 1 through 200.

TABLE OF CONTENTS


Page

QUESTIONS PRESENTED ..... i
PARTIES ..... ii
TABLE OF AUTHORITIES ..... v
DECISIONS BELOW ..... 1
JURISDICTION ..... 2
CONSTITUTIONAL AND STATUTORY PROVISIONS ... 3
STATEMENT OF THE CASE ..... 3
REASONS FOR GRANTING THE WRIT ..... 8

I. THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH DECISIONS OF THE UNITED STATES COURTS OF APPEAL FOR THE FIRST, SECOND, SIXTH, SEVENTH, TENTH AND ELEVENTH CIRCUITS BY LIMITING WHAT A PUBLIC SCHOOL TEACHER MAY SAY WITHOUT ANY SHOWING OF THE "MATERIAL AND SUBSTANTIAL DISRUPTION" REQUIRED BY *TINKER* ..... 10

II. THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH THIS COURT'S PRIOR DECISIONS ON CONTENT- AND VIEWPOINT- BASED DISCRIMINATION AND ON CONSTRUING FIRST AMENDMENT COMPLAINTS ..... 14

A. The Ninth Circuit Applied An Incorrect Standard for Reviewing a Content- and Viewpoint-based Restriction on Speech ..... 14

TABLE OF CONTENTS—Continued

Page

B. The Ninth Circuit Failed to Take as True the Well-pled Facts of the Complaint in this First Amendment Case ..... 19

CONCLUSION ..... 23

APPENDIX TO THE PETITION

Opinion, United States District Court for the Central District of California (January 16, 1992) ... 1a
Opinion, United States Court of Appeal for the Ninth Circuit (July 25, 1994) (*withdrawn* September 20, 1994) ..... 18a
Opinion, United States Court of Appeal for the Ninth Circuit (October 4, 1994)..... 38a
Order denying rehearing, United States Court of Appeals for the Ninth Circuit (November 25, 1994) ..... 57a
Plaintiff's Complaint and Application for Injunctive and Declaratory Relief (September 30, 1991) ..... 58a

TABLE OF AUTHORITIES

Page(s)

Cases

*Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987) ..... 17
*Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) ..... 13
*Boos v. Barry*, 485 U.S. 312 (1988) ..... 15
*Bradley v. Pittsburgh Bd. of Education*, 910 F.2d 1066 (3d Cir. 1990) ..... 12
*Capitol Square Review and Advisory Board v. Pinette*, Docket No. 94-780, *review granted*, 63 U.S.L.W. 3537 (Jan. 13, 1995) ..... 23
*Carey v. Brown*, 447 U.S. 455 (1980) ..... 14, 16
*Cornelius v. NAACP-LDEF, Inc.*, 473 U.S. 788 (1985) ..... 17
*Daniels v. Quinn*, 801 F.2d 687 (4th Cir. 1986) .... 12
*Dodds v. Childers*, 933 F.2d 271 (5th Cir. 1991) ... 12
*East Hartford Ed. Ass. v. Bd. of Education*, 562 F.2d 838 (2d Cir. 1977) ..... 13
*Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) .... 16
*FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) ..... 17
*Fowler v. Bd. of Education*, 819 F.2d 657 (6th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987) ..... 13
*Frisby v. Schultz*, 487 U.S. 474 (1988) ..... 17
*Hall v. Marion School Dist.*, 31 F.3d 183 (4th Cir. 1994) ..... 12
*James v. Bd. of Education*, 461 F.2d 566 (2d Cir. 1972) ..... 13
*Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969) ... 13

TABLE OF AUTHORITIES—Continued

Page(s)

*Kim v. Coppin State College*, 662 F.2d 1055 (4th Cir. 1981) ..... 12
*Kingsville Sch. Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980) ..... 12
*Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273 (5th Cir. 1990) ..... 12
*Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794 (5th Cir. 1989) ..... 12
*Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993) ..... 17, 18
*Lee v. Weisman*, 120 L.Ed.2d 467 (1992) ..... 16
*Lemon v. Kurtzman*, 403 U.S. 602 (1971) ... 17, 18, 19
*Lynch v. Donnelly*, 465 U.S. 668 (1984) ..... 18, 19
*Martin v. Struthers*, 319 U.S. 141 (1943) ..... 16
*Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) ..... 17
*Miles v. Denver Public School*, 944 F.2d 773 (10th Cir. 1991) ..... 13
*Minarcini v. Strongsville*, 541 F.2d 577 (6th Cir. 1976) ..... 13
*Nicholson v. Board of Education*, 682 F.2d 858 (9th Cir. 1982) ..... 11-12
*Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) ..... 15
*Parratt v. Taylor*, 451 U.S. 527 (1981) ..... 19
*Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir. 1994) ..... 1, *passim*
*Peloza v. Capistrano Unified School Dist.*, 782 F. Supp. 1412 (C.D.Cal. 1992), *aff'd*, 37 F.3d 517 (9th Cir. 1994) (per curiam) ..... 1, *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

*Pickering v. Board of Education*, 391 U.S. 563 (1968) ..... i, 9, *passim*
*Police Dep't v. Mosley*, 408 U.S. 92 (1972) ..... 14, 16
*R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) ..... 15, 17
*Rankin v. McPherson*, 483 U.S. 378 (1987) ..... 12
*Raposa v. Meade School Dist.*, 790 F.2d 1349 (8th Cir. 1986) ..... 12
*Regan v. Time, Inc.*, 468 U.S. 641 (1984) ..... 17
*Rosenberger v. Rector and Visitors of the University of Virginia*, Docket No. 94-329, *review granted*, 63 U.S.L.W. 6346 (Oct. 31, 1994) ..... 23
*Russo v. Central School Dist.*, 469 F.2d 623 (2d Cir. 1972) ..... 13
*Sanguigni v. Pittsburgh Bd. of Education*, 968 F.2d 393 (3d Cir. 1992) ..... 12
*Scheuer v. Rhodes*, 416 U.S. 232 (1974) .... 19-21, 22
*Stroman v. Colleton County School Dist.*, 981 F.2d 152 (4th Cir. 1992) ..... 12
*Thornhill v. Alabama*, 310 U.S. 88 (1940) ..... 16
*Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) ..... i, 8, *passim*
*Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993) ..... 13
*Ward v. Rock Against Racism, Inc.*, 491 U.S. 781 (1989) ..... 15
*Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) ..... 18
*Widmar v. Vincent*, 454 U.S. 263 (1981) ..... 18
*Zykan v. Warsaw*, 631 F.2d 1300 (7th Cir. 1980) ..... 13

TABLE OF AUTHORITIES—Continued

Page(s)

Constitutional Provisions, Statutes, Rules

U.S. CONST. amend I, cl. 1 ..... i, *passim*
U.S. CONST. amend I, cl. 3 ..... i, *passim*
U.S. CONST. amend XIV, § 1 ..... 2, *passim*
Title 28 U.S.C. § 1254(1) ..... 2
Title 42 U.S.C. § 1983 ..... 3, 4, 21
Title 42 U.S.C. § 1985(3) ..... 3, 4-5, 22
Fed. R. Civ. P. 12(b)(6) ..... i, 5, 6, 19, *passim*

Other Authorities

CLARICK, "Public School Teachers and the First Amendment: Protecting the Right to Teach," 63 N.Y.U.L.REV. 693 (June 1990) ..... 11

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

---

No. _____

---

JOHN E. PELOZA,

*Petitioner,*

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT, *et al.*,

*Respondents.*

---

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

---

## DECISIONS BELOW

The decision of the United States District Court is reported as *Peloza v. Capistrano Unified School Dist.*, 782 F. Supp. 1412 (C.D.Cal. 1992) (App. 1a) (hereafter referred to as *Peloza* I). The original panel decision of the United States Court of Appeals for the Ninth Circuit, which subsequently was withdrawn, is unreported and appears in the Appendix hereto (App. 18a) (hereafter referred to as *Peloza* II). The decision of the United States Court of Appeals for the Ninth Circuit is reported as *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir. 1994) (App. 38a) (hereafter referred to as *Peloza* III). The order of the United States Court of Appeals for the Ninth Circuit

denying the Petition for rehearing with suggestion of rehearing en banc is unreported and appears in the Appendix hereto (App. 57a).

## JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment in this case on October 4, 1994. A petition for rehearing with suggestion of rehearing *en banc* was denied on November 25, 1994. This Court has jurisdiction under Title 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part, as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

U.S. CONST. amend I, cl. 1-3.

The first section of the Fourteenth Amendment to the United States Constitution provides, in part, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

U.S. CONST. amend XIV, § 1.

In pertinent part, Title 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

In pertinent part, Title 42 U.S.C. § 1985(3) states:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

## STATEMENT OF THE CASE

In this case, John Peloza, a teacher employed with the Capistrano Unified School District, sued the school district and certain individuals. *See generally* Complaint, App. 58a-77a.

Peloza brought suit after his superiors ordered him not to answer questions from his students about matters involving religion, even when students sought Peloza out during lunch periods, interclass breaks or other noninstructional or nonclass time. App. 60a.[1] That directive, in the view of Judge Poole, dissenting below, would censor discussion "during lunch . . . about Malcolm X or Martin Luther King's religious beliefs, and how and why they evolved, or about the origins of Islam, or what the seven great religions of the world were." App. 53a-54a.

Peloza has been ordered not to answer student inquiries about religious matters. App. 60a, 67a-68a. This prohibition applies only to Peloza and is not limited to discussions in class. Instead, the school district and its employees have prohibited Peloza from answering any such inquiries while "on contract" (i.e., at anytime while working as a teacher). *Id.*

Peloza filed suit in 1991. He alleged that the foregoing conduct of the Respondents injured federal civil and constitutional rights, including the rights to freedom of speech, freedom from an unlawful establishment of religion, due process

---

1 Peloza complained as well that the school district and certain individual Respondents reprimanded him and subjected him to unfounded public criticism, based on false statements, because he resisted their efforts to violate the Establishment Clause of the United States Constitution. App. 59a-60a. Peloza asserted injuries to several rights redressable under Title 42 U.S.C. §§ 1983 and 1985. App. 70a-72a, 72a-74a. The Respondents and others not identified at the time of the filing of the Complaint conspired to injure Peloza's reputation. App. 72a-74a. In the school newspaper and in the public press, Peloza was wrongly accused of teaching religion in his science classes. App. 66a-67a. A formal reprimand was issued against him by his school's principal. App. 67a-68a.

of law, and equal protection. App. 71a. In addition to his federal civil rights claims, Peloza asserted the existence of a § 1985(3) civil rights conspiracy targeting him for the deprivation of these same rights. App. 73a-74a. Finally, Peloza asserted a state law civil rights claim under California's Tom Bane Civil Rights Act. App. 75a.

The district court dismissed Peloza's federal claims with prejudice. *Peloza v. Capistrano Unified School District*, 782 F. Supp. 1412 (C.D.Cal. 1992) (*Peloza* I), App. 1a. The dismissal was granted, putatively, because Petitioner failed to state a claim on which relief could be granted. App. 17a. The district court, however, failed to take as true the well-pled facts of the Complaint.[2] Instead, the Court accepted characterizations of the Complaint proffered by the Respondents and disposed of Petitioner's claims. *Id.*

Although ultimately it affirmed the judgment of the district court, the Ninth Circuit panel found that Peloza's complaint raised "important questions of first impression in this circuit," *Peloza* III, App 53a, and, the panel concluded, "[t]he school district's restriction on Peloza's ability to talk with students about religion during the school day is a restriction on his right to free speech," *Peloza* III, App. 48a. Nevertheless, the district court, ruling on the Rule 12(b)(6) motion, stated that the issue before him on the motion was, "*whether Peloza has a constitutional right to conduct himself as a loose cannon in his*

---

2 *Compare* Complaint ¶¶ 1, 54, 64, App. 59a, 71a, and 73a (Petitioner did not seek to indoctrinate students in the view that the world was the product of special creation; petitioner sought to teach his students to discriminate between philosophies and scientific theory) with *Peloza I*, App. 2a (describing the suit as an assertion of Petitioner's right to "teach his students pursuant to his belief in the system of creationism, as expounded in Genesis").

*classroom or on the campus and teach scientific theories of his own choosing* despite the fact that they are not authorized by and are prohibited by the State Board of Education curriculum." App. 6a.[3]

Initially, the United States Court of Appeals forthe Ninth Circuit reversed in part the judgment of the district court, and remanded for further consideration at least one of Petitioner's § 1983 claims. *Peloza v. Capistrano Unified School District*, slip opinion, (July 25, 1995) (App. 18a) (*Peloza* II). Subsequently, the panel recalled the mandate, withdrew its initial decision, and entered a new judgment affirming the judgment of the district court. *See Peloza v. Capistrano Unified School District*, 37 F.3d 517 (9th Cir. 1994) (App. 38) (*Peloza* III). Judge Poole concurred in part and dissented in part. App. 52a.

Although it affirmed the judgment below, the *per curiam* opinion recognized that Peloza had "present[ed] important

---

3 In other words, the district court's ruling on the 12(b)(6) motion was founded on an improper (and incorrect) *factual conclusion*, not a legal pleading. Obviously, Peloza did not assert a right to act as a "loose cannon." His Complaint states that he was being compelled to indoctrinate students in a religious belief, contrary tothe proscription of the Establishment Clause, *see* Complaint ¶ 1, App. 59a ("Plaintiff is not seeking either 'balanced treatment' or 'equal time' in the classroom for the religious belief of creationism"), *id.* ("Plaintiff desires his classroom to be void of the imposition of any philosophical and religious belief systems"), *id.* ("forcing [Petitioner] to teach the religious belief system of evolutionism as a valid scientific theory would force him to become an unwilling agent of the school district in the establishment of the religion of secular humanism, in violation of the First Amendment to the United States Constitution"), and that he was placed under a rule of silence applicable only to one teacher in the employ of the school district: Peloza. Complaint ¶¶ 2-3, App. 60a.

questions of first impression in this circuit[,]" App 52a regarding his free speech rights; further, the panel expressed no doubt that "[t]he school district's restriction on Peloza's ability to talk with students about religion during the school day is a restriction on his right to free speech." App. 47a.

The panel found Peloza's claim to be one "involv[ing] substantial questions and requir[ing] the balancing of rights of free speech against the Establishment Clause." App. 52a. This balancing, Petitioner had urged, did not support the Respondents' imposition of a rule of silence on only Peloza. But, the panel concluded, discussions of matters of religion "with students during school time on school grounds would violate the Establishment Clause of the First Amendment." App. 48a. Consequently, the panel held, "[t]he school district's interest in avoiding an Establishment Clause violation trumps Peloza's right to free speech." App. 47a.

Judge Poole sharply dissented from that portion of the per curiam which affirmed the dismissal of Peloza's freedom of speech claims. App. 52a. Noting the "procedural posture of the case," App. 53a, Judge Poole concluded that the Complaint contained sufficient, well-pled facts to take Peloza's free speech claims beyond a Rule 12(b)(6) dismissal, App. 56a.

The Establishment Clause issues were not lightly dismissed by the dissent. Rather, Judge Poole reasoned that, while school districts have legitimate interests in complying with the Establishment Clause, such legitimate interests would not support a complete ban on *all* discussions about religion by a teacher. App. 53a-54a. The school district's rule of silence, Judge Poole concluded, would censor discussion "during lunch . . . about Malcolm X or Martin Luther King's religious beliefs, and how and why they evolved, or about the origins of Islam, or what the seven great religions of the world were." *Id.* The Complaint

stated a claim on which relief could be granted, Judge Poole concluded, because it included an allegation that the school district had ordered Petitioner "'not to discuss any religious matters . . . during lunch, class breaks, and before and after school hours . . . .'" App. 55a (*quoting* Complaint ¶ 3, App. 61a).

A timely petition for rehearing, with suggestion of rehearing en banc, was denied by the United States Court of Appeals for the Ninth Circuit on November 25, 1994.

## REASONS FOR GRANTING THE WRIT

In *Tinker*, this Court dismissed arguments that "either students *or teachers* shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506 (emphasis added). This Court's view summarized "the unmistakable holding of this Court for almost 50 years." *Id.* And in *Tinker*, this Court held that restrictions on freedom of speech or expression within the schoolhouse gates could not be justified by assertions of "undifferentiated fear or apprehension of disturbance . . . ." *Id.*, 393 U.S. at 508. This Court reasoned that, although "any variation from the majority's opinion may inspire fear[,]" *id.*, and even though "any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance[,]" *id.*, "our Constitution says we must take [the] risk," of "this sort of hazardous freedom . . . ." *Id.* Consequently, in *Tinker*, this Court concluded a student "may express his opinions, even on controversial subjects . . . if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.*, 393 U.S. at 513 (citation omitted).

Previously, in *Pickering*, this Court addressed the issues related to the right to freedom of speech of public school teachers. There, this Court used a two-prong analysis to determine whether the teacher's speech addressed a matter of public concern, *id.*, 391 U.S. at 572-73, and whether, in cases in which the speech did address issues of public concern, the teacher would have lost his job notwithstanding his speech, *id.* at 573-75.

Consequent to the decisions in *Tinker* and *Pickering*, courts of the United States have decided a striking variety of free speech claims raised by publicly employed teachers. *See infra* at 12 n.5, and at 13 (citing cases). These cases fall broadly into two categories: those in which the court relies on *Tinker*'s "material and substantial disruption" test, *see infra* at 13; and, those cases in which courts have relied on *Pickering*'s public employee speech formulation, *see infra* at 12 n.5.

This petition provides this Court with the opportunity to consider and resolve this fully developed conflict between the circuits.

Furthermore, the decision of the Ninth Circuit should be reviewed and reversed because the Ninth Circuit failed to follow this Court's teaching regarding governmental restrictions on speech which are content- or viewpoint-based, and on the dismissal of civil rights claims for failure to state a claim on which relief could be granted.

## I. THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH DECISIONS OF THE UNITED STATES COURTS OF APPEAL FOR THE FIRST, SECOND, SIXTH, SEVENTH, TENTH AND ELEVENTH CIRCUITS BY LIMITING WHAT A PUBLIC SCHOOL TEACHER MAY SAY WITHOUT ANY SHOWING OF THE "MATERIAL AND SUBSTANTIAL DISRUPTION" REQUIRED BY *TINKER*

Confronted with a civil rights claim in which the only pleading before the court established that the Respondents had issued a directive to Peloza, a publicly employed teacher, not to discuss certain topics with students (even outside of class-time), the district court should have looked to the "material and substantial disruption" standard to decide the constitutionality of the anti-speech directive. That standard is the one used by the United States Courts of Appeal for the First, Second, Sixth, Seventh, Tenth and Eleventh Circuits. *See infra* at 13. Instead, the district court explicitly invoked this Court's public employee speech formulation in concluding that Peloza's free speech claims should be dismissed under F. Civ. R. P. 12(b)(6). *Peloza* I, App. 12a-14a. And the divided panel of the Ninth Circuit implicitly applied that same doctrinal formulation to Peloza's claim *Peloza* III, App. 46a-48a. The Ninth Circuit's choice of the public employee speech doctrine is in harmony with the approach taken in the United States Courts of Appeal for the Third, Fourth, Fifth and Eighth Circuits, *see infra* at 12, n. 5, but in conflict with the approach taken in the First, Second, Sixth, Seventh, Tenth and Eleventh Circuits. *See infra* at 13 (citing cases).

The choice of doctrines, and the conflict between the circuits over which doctrine to apply in classroom and school

settings, is significant.[4] As set forth herein, the Ninth Circuit's choice of doctrine made a difference in the outcome of this case since the only pleading before the district court and the Ninth Circuit panel provided no basis on which either court could have asserted that Peloza's speech would cause a "material and substantial disruption" of the school.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court held that governmental entities have an enhanced interest in regulating the speech of their employees when acting in the role of employer. *Id.* at 568. Nevertheless, even government employees were not to be regarded as relinquishing "the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." *Id*

In *Pickering*, this Court tested a claimed violation of a government employee's free speech rights by use of a two-step analysis. First, this Court considered whether the employee's speech addressed a matter of public concern. *Id.* at 572-73. Concluding in that case that the speech addressed an issue of public concern, this Court held that the government had the burden of proving that the employee would have lost his job notwithstanding his speech. *Id.* at 573-75.

The United States Court of Appeals for the Ninth Circuit applied the analysis from *Pickering* to the speech rights of a publicly employed teacher in *Nicholson v. Board of Education*,

---

4 The choice between *Pickering* and *Tinker* in cases of teachers asserting free speech claims in classroom settings, and many of the lower court cases noted in this argument, have been discussed more fully in CLARICK, "Public School Teachers and the First Amendment: Protecting the Right to Teach," 63 N.Y.U.L.REV. 693 (June 1990).

682 F.2d 858 (9th Cir. 1982).[5] In *Nicholson*, the Ninth Circuit addressed a teacher's First Amendment claim arising out of school authorities' failure to rehire him after he refused to follow regulations regarding the pre-publication review of articles in the school newspaper, of which he was the faculty supervisor. 682 F.2d at 861-62. Applying *Pickering*, the Ninth Circuit weighed the school's interest in eliminating the combined effect of the teacher's speech and insubordinate conduct against the teacher's interest in free speech. 682 F.2d at 864-66. The Ninth Circuit concluded that the school's interest were sufficiently weighty to prevail over the teacher's claims. *Id.*

Here, the district court explicitly applied this Court's "public employee" speech doctrine. *See Peloza* I, App. 12a-14a. The district court relied on *Pickering*, App. 13a, and on *Pickering*'s progeny, *Rankin v. McPherson*, 483 U.S. 378 (1987). App. 12a. The Ninth Circuit affirmed the district court's decision and did not upbraid the district court for its reliance on the *Pickering* line of cases. Albeit *sub silentio*, the panel applied the

---

5 The Ninth Circuit is not alone in its application of *Pickering* to disputes involving the speech of publicly employed teachers. The United States Courts of Appeal for the Third Circuit, *see Bradley v. Pittsburgh Bd. of Education*, 910 F.2d 1066 (3d Cir. 1990) and *Sanguigni v. Pittsburgh Bd. of Education*, 968 F.2d 393 (3d Cir. 1992), the Fourth Circuit, *see Daniels v. Quinn*, 801 F.2d 687, 689 (4th Cir. 1986), *Hall v. Marion School Dist.*, 31 F.3d 183 (4th Cir. 1994), *Kim v. Coppin State College*, 662 F.2d 1055 (4th Cir. 1981), and *Stroman v. Colleton County School Dist.*, 981 F.2d 152, 155-56 (4th Cir. 1992), the Fifth Circuit, *see Dodds v. Childers*, 933 F.2d 271, 273-74 (5th Cir. 1991), *Kingsville Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980), *Kinsey v. Salado Indep. School Dist.*, 916 F.2d 273 (5th Cir. 1990) and *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794 (5th Cir. 1989) and the Eighth Circuit, *Raposa v. Meade School Dist.*, 790 F.2d 1349 (8th Cir. 1986), all apply *Pickering* analysis in such cases.

standard of analysis of *Pickering* and *Nicholson*, in concluding that, "[t]he school district's interest in avoiding an Establishment Clause violation *trumps* Peloza's right to free speech." App. 47a.

To the contrary of the rule applied below, and in cases in the Third, Fourth, Fifth, Eighth and Ninth Circuits, the United States Courts of Appeals for the First, Second, Sixth, Seventh, Tenth, and Eleventh Circuits apply the standards developed in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), to claims of injury to the free speech rights of publicly employed teachers.

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), this Court held that teachers and students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.*, 393 U.S. at 506. Analyzing speech in the school context, this Court held that restrictions on speech in public schools are valid only where it is shown that the speech causes a substantial interference with the educational mission of the school. *Id.*, 393 U.S. at 509.

Contrary to the Ninth Circuit, the United States Courts of Appeal for the First Circuit, *see Keefe v. Geanakos*, 418 F.2d 359, 361-62 (1st Cir. 1969) and *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), the Second Circuit, *see East Hartford Educ. Ass'n v. Bd. of Education*, 562 F.2d 838, 842-44 (2d Cir. 1977), *James v. Bd. of Education*, 461 F.2d 566, 571 (2d Cir. 1972), and *Russo v. Central School Dist.*, 469 F.2d 623, 633-34 (2d Cir. 1972), the Sixth Circuit, *see Minarcini v. Strongsville*, 541 F.2d 577 (6th Cir. 1976), and *Fowler v. Bd. of Education*, 819 F.2d 657, 662-63 (6th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987), the Seventh Circuit, *see Zykan v. Warsaw*, 631 F.2d 1300, 1304-06 (7th Cir. 1980), the Tenth Circuit, *see Miles v. Denver Public School*, 944 F.2d 773, 775-76 (10th Cir. 1991), and the Eleventh Circuit, *see Bishop v. Aronov*, 926 F.2d 1066, 1071, 1077 (11th Cir. 1991), all apply the

"material and substantial disruption" test developed in this Court's decision in *Tinker* to cases of claimed injury to the free speech rights of publicly employed teachers.

The application of *Tinker* in the present case would, undoubtedly, have led to the conclusion that the directive not to answer students' questions about religion was unconstitutional. At this stage in the case, the courts below simply had no evidence before them from which they could have concluded that the Respondents could validly assert that Peloza's conversations with students were the cause of a "material and substantial disruption" of school order or discipline. See generally, Complaint, App. 58a.

Consequently, this Court should grant the petition for a writ of certiorari and resolve this fully developed conflict on the standard of review to be applied to claims of injury to the free speech rights of publicly employed teachers.

## II. THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH THIS COURT'S PRIOR DECISIONS ON CONTENT- AND VIEWPOINT-BASED DISCRIMINATION AND ON CONSTRUING FIRST AMENDMENT COMPLAINTS

### A. The Ninth Circuit Applied An Incorrect Standard for Reviewing a Content- and Viewpoint-based Restriction on Speech

The directive not to answer student questions about religion, and not to discuss religion with students, is content- and viewpoint-based. The directive is obviously content-based because it looks to content in deciding whether speech may be uttered. *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972). As this Court has explained, regulations affecting speech are not content-neutral

unless they are "'justified without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism, Inc.*, 491 U.S. 781, 791 (1989) (citation omitted). The Respondents, however, conditioned Peloza's right to freedom of speech precisely on the content of such speech; such conditioning, solely reflecting the Respondents' disagreement with the content of Peloza's speech, cannot pass constitutional muster. *See, e.g., R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (striking city's hate-motivated crimes ordinance); *Boos v. Barry*, 485 U.S. 312 (1988) (striking statute which regulated protests that held foreign dignitariesup to public opprobrium).[6]

It is axiomatic that the right to freedom of speech is not subject to prevailing notions of taste. *See, e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("so long as the means are peaceful, the communication need not meet standards of acceptability"). Ideas can affect listeners (including students) and cause controversy. Consequently, this Court has required proof of substantial abuse before censoring controversial speech:

> Every expression of opinion on matters that are important has the potentiality of inducing action in the interest of one group rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion on matters of public interest merely on the showing that others may thereby be persuaded to take action inconsistent with its interest. Abridgment of the liberty of such discussion can be justified only when a clear danger of substantive evils

---

6 The Respondents may not "impose special prohibitions on those speakers who express views on disfavored subjects" or on the basis of hostility -- or favoritism -- towards the underlying message. *R.A.V.*, 112 S. Ct. at 2547-49.

> arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.

*Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940).

The Respondents lack constitutional warrant to "protect" citizens (i.e., students) from "religious" speech: "there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. . . . But these matters, often questions of accommodation of religion, are not before us." *Lee v. Weisman*, 120 L.Ed.2d 467, 488 (1992) (citation omitted); *cf. Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975) ("[b]ut when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the grounds that they are more offensive than others, the First Amendment strictly limits its power"). Plainly, a directive not to answer any students' inquiry regarding religion at anytime or any place during the school day and not to discuss matters of religion with students "has no place in this country. . . . [U]nity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity of opinion, through the fullest possible measure of freedom of conscience and thought." *Martin v. Struthers*, 319 U.S. 141, 150 (1943).

The "no answers to religion questions" ban fails the strict governing constitutional standards. When "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition," *Carey*, 447 U.S. at 462, the law unconstitutionally censors. *Police Dep't*, 408 U.S. at 95-96 ("[t]he essence of this forbidden censorship is content control . . . . Selective exclusions . . . may not be based on content alone, and may not be justified by . . . content alone"); *accord Carey*, 447 U.S. at 462-63. A "content-based exclusion" is impermissible unless the government can "show that its regulation is necessary

to serve a compelling interest and that it is narrowly drawn to achieve that end." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (internal quotation marks and citation omitted).[7]

The Respondents' directive is raw censorship. The ban discriminates based on content of speech. Because the restriction on answering students' questions about religion applies only to Peloza, it appears that Peloza's *viewpoint* led to the decision to silence him. As a general principle, viewpoint discrimination by government actors is unconstitutional. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (and cases cited); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993). Indeed, viewpoint discrimination is so odious that, even in a *nonpublic* forum, such regulations always are unconstitutional. *Cornelius v. NAACP-LDEF, Inc.*, 473 U.S. 788, 806 (1985). Such viewpoint censorship is incompatible with the first amendment.

Whether analyzed as a content restriction or a viewpoint restriction, the directive was not necessary to further any compelling interest in avoiding a violation of the Establishment Clause of the United States Constitution. The Ninth Circuit erred in concluding that the directive suppressing Peloza's speech was necessary to prevent a violation of the Establishment Clause. The panel's application of *Lemon v. Kurtzman* is insupportable.

---

7 *Cf. R.A.V.*, (hate crimes statute that relies on impact of speech for imposition of criminal liability is unconstitutional); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 230 (1987) (it is "incompatible with the First Amendment" to scrutinize content of speech to determine extent to which speech may be regulated); *FCC v. League of Women Voters of California*, 468 U.S. 364, 383 (1984); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("[r]egulations which permit the government to discriminate on . . . content . . . cannot be tolerated").

The Ninth Circuit reasoned as follows:

> To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. In sum, it would flunk all three parts of the test articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

*Peloza* III, App. 48a. Principal among the flaws in the Ninth Circuit's reasoning is that the court focussed on the conjectured religious speech imputed to Peloza by the Respondents. The Ninth Circuit should have, instead, focussed on the governmental *policy* at issue. Choosing to focus on the religious element inevitably leads to invalidity. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) ("[t]he District Court plainly erred by focusing almost exclusively on the Creche"). But in other cases regarding religious speech, *e.g.*, *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Lamb's Chapel*, this Court has focussed on governmental *policy*, not the *particulars* of some challenged text or speech.

Contrary to the *Lemon* conclusion reached by the Ninth Circuit, Peloza's interaction with his students in an unencumbered academic environment passes constitutional muster. The primary purpose of academic freedom is secular: academic freedom serves the interest in fostering education and advancing learning. The primary effect, furthermore, would not be to advance Peloza's religion, but to foster the important federal and state constitutional and statutory rights that are implicated in open discussion. Finally, a policy which leaves Peloza free to decide whether to answer a student's questions about religion or not, free from

concerns about the directive not to speak with students, does not entangle the school district in religion.[8] Peloza was not unconstitutionally entangled in religion merely because he discussed religion with inquiring students. In his dissent below, Judge Poole noted that the directive would bar serious discussion "during lunch . . . about Malcolm X or Martin Luther King's religious beliefs, and how and why they evolved, or about the origins of Islam, or what the seven great religions of the world were." App. 53a-54a. Plainly, discussions of these matters are suppressed under the directive; just as plainly, these matters are readily capable of being discussed without hopelessly entangling the Respondents or Peloza in religion.

### B. The Ninth Circuit Failed to Take as True the Well-pled Facts of the Complaint in this First Amendment Case

Even a cursory review of Peloza's federal civil rights and civil rights conspiracy complaint demonstrates thatthe motion for dismissal pursuant to Rule 12(b)(6) should not have been granted.

The gravamen of a civil rights claim under Title 42 U.S.C. § 1983 is the assertion of an injury to a right protected by the Constitution or laws of the United States caused by a person acting under color of state law. *See Parratt v. Taylor*, 451 U.S. 527, 535 (1981) ("the two essential elements to a § 1983 action are[:] (1) whether the conduct complained of was committed by

---

8 Obviously, in ruling on the appeal from a dismissal of a Complaint for failure to state a claim on which relief could be granted, the Ninth Circuit acted precipitously in concluding that an excessive entanglement would result from Peloza's responses to students' inquiries about religion. Peloza's Complaint simply provided no basis on which the Ninth Circuit could rest its conclusion. *Cf. Lynch*, 465 U.S. at 684 ("[e]ntanglement is a question of kind and degree").

a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States"). The factual and legal allegations necessary to assert a § 1983 claim are clearly set forth in the Complaint. Peloza allegedthat each of the Respondents acted under color of state law. Complaint ¶¶ 5-19, App. 60a-63a; Complaint ¶ 52, App. 70a-71a. Further, Peloza alleged that the conduct complained of injured him in the exercise of rights protected by the Constitution or laws of the United States. Complaint ¶¶ 1-3, App. 58a-60a; Complaint ¶¶ 52-55, App. 70a-72a; Complaint ¶ 68, App. 74a; ¶ 70, App. 75a.[9]

The Ninth Circuit disobeyed this Court's instructions regarding disposition of claims on motion made under Fed. R. Civ. P. Rule 12(b)(6). In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), this Court addressed dismissals pursuant to Rule 12(b)(6) of claims arising from the Kent State University "incident." Following the shooting deaths on the campus of Kent State

---

9 The initial panel decision, *Peloza* II, App. 18a et seq., correctly identified a claim by Peloza of an Establishment Clause violation by the school district, and held that the district judge erred in resolving the claim contrary to facts alleged in the Complaint. App. 25a ("[p]ut another way, if the school district supported atheism as Peloza has alleged, it would violate the second prong of the Lemon test, which requires that a state policy 'neither advance[] *nor inhibit[]* religion.' *Lemon*, 403 U.S. at 612 (emphasis added)."). Essentially, the panel's first impression was right; the relevant factual questions could not be resolved contrary to the complaint on a motion to dismiss. Some of those factual questions are: (i) what did the school district require Peloza to teach; (ii) whether the instruction Peloza was required to give involved atheism or inhibition of religion; (iii) what Peloza actually did teach, or what he actually wanted to teach, in place of the required instruction that, to his understanding, would violate the Establishment Clause of the United States Constitution.

University, personal representatives of the decedents' estates brought actions under § 1983 against the Governor of Ohio, the Adjutant General of Ohio, and various officers and enlisted personnel in the Ohio National Guard. 416 U.S. at 233.

The district court dismissed the suits on the grounds of Eleventh Amendment immunity. 416 U.S. at 234. The Sixth Circuit affirmed, although it noted the additional, alternative ground "that the common-law doctrine of executive immunity barred action against the state officials" who were respondents in that case. 416 U.S. at 234-35. This Court reversed, noting:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. *The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.* Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

416 U.S. at 236 (emphasis added).

In *Scheuer*, this Court found "no present occasion for a definitive exploration of" the issues that led to dismissal in the trial court, "because of the absence of a factual record . . . ." 416 U.S. at 249. As in *Scheuer*, 416 U.S. at 250,

> [t]he documents properly before the [trial] court at this early pleading stage specifically placed in issue whether

> [the school district, its officers and employees] were acting within the scope of their duties under [state law]; whether [the Respondents] acted within the range of discretion permitted the holders of such [positions] . . . . Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.

The Ninth Circuit should have reversed the district court's judgment and remanded for further proceedings. In fact, initially, the Ninth Circuit did so. App. 18a. The subsequent, sua sponte recall of the mandate and issuance of a new judgment by the per curiam panel reflects a fundamental misunderstanding of Rule 12(b)(6) practice. *Cf. Scheuer*, 416 U.S. at 236 ("'we follow . . . the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief") (citation omitted).

Consequently, the Ninth Circuit erred in granting a judgment affirming the district court's dismissal of Peloza's § 1983 claims.[10]

---

10 The Ninth Circuit affirmed the dismissal of Peloza's conspiracy claim under § 1985(3) because it concluded that, since his allegations regarding direct violations of his rights to free speech and due process were "insufficient to support a claim based on a violation of his constitutional rights of free speech and due process[,] his allegations of a conspiracy to violate these constitutional rights do not state a claim." App. 50a. Peloza does not abandon his § 1985(3) conspiracy claim here.

## CONCLUSION

This Court is currently considering two cases which address applications of the Establishment Clause and the Freedom of Speech Clause. *Rosenberger v. Rector and Visitors of the University of Virginia*, Docket No. 94-329, *review granted*, 63 U.S.L.W. 6346 (Oct. 31, 1994) and *Capitol Square Review and Advisory Board v. Pinette*, Docket No. 94-780, *review granted*, 63 U.S.L.W. 3537 (Jan. 13, 1995). Because the instant Petition raises related issues of the balance to be struck between competing claims under the Freedom of Speech Clause and the Establishment Clause, this Court should hold this petition pending the outcomes in *Rosenberger* and *Pinette*. After the decisions in those cases are rendered, this Court should grant this petition, vacate the judgment of the Ninth Circuit below, and remand for further consideration in light of *Rosenberger* and *Pinette*. In the alternative, this Court should grant this petition and set the case for plenary review.

Respectfully submitted,

**KEITH A. FOURNIER**
The American Center for
Law & Justice
1000 Regent Univ. Drive
Virginia Beach, VA 23467
(804) 579-2489

**WENDELL R. BIRD**
**DAVID J. MYERS**
Bird & Myers
1150 Monarch Plaza
3414 Peachtree Road, NE
Atlanta, GA 30326
(404) 264-9400

**JAY ALAN SEKULOW ***
**JAMES M. HENDERSON, SR.**
**JOEL H. THORNTON**
The American Center for
Law & Justice
1000 Thos. Jefferson St.
Suite 520
Washington, DC 20007
(202) 337-2273

**CYRUS ZAL**
Law Offices of Cyrus Zal
102 Mainsail Court
Folsom, CA 95630
(916) 985-3576

* *Counsel of Record*

*Attorneys for Petitioner*

February 23, 1995.

**APPENDIX TO THE PETITION**

BEST AVAILABLE COPY

[Decided January 16, 1992]

JOHN E. PELOZA, Plaintiff,
v.
CAPISTRANO UNIFIED SCHOOL DISTRICT, et al.,
Defendants.
No. CV 91-5268-DWW (Bx).
United States District Court,
C.D. California.

Cyrus Zal, Fullerton, Cal., for plaintiff.

Rutan & Tucker by David C. Larsen, Costa Mesa, Cal., for defendants.

MEMORANDUM

DAVID W. WILLIAMS, Senior District Judge.

This memorandum revisits the long-standing debate between scientists and fundamentalists about human origins--the theories of evolution v. creationism. The Darwinian theory that humans are derived from lower life forms vs. the Christian concept in the opening Chapters of the Book of Genesis that (1) "In the beginning God created the heaven and the earth. (2) And the earth was without form, and void; and darkness was upon the face of the deep."

JURISDICTION

Plaintiff alleges violations of federal law, particularly the First, Fifth and Fourteenth Amendments to the United States Constitution and also 42 U.S.C. ss 1981, 1983, 1985(3), 28 U.S.C. § 1343 and the Doctrine of Pendent Jurisdiction.

## FACTUAL BACKGROUND

John E. Peloza is a biology teacher in a public high school in the Capistrano Unified School District and he has brought this action for declaratory and injunctive relief and for damages arising out of his contention that he has the constitutional right to teach his students pursuant to his belief in the system of creationism, as expounded in Genesis. Adversely the school system contends that his biology classes should be taught pursuant to an accepted theory of evolution which is defined within the framework of the California Education Code. Pursuant to the code, each school district is required to establish local curriculum for grades 7 through 12. Such a curriculum must include the biological sciences as well as other standard subjects. The curriculum sets forth the subjects that must be covered in the high school biology class. The school district must maintain uniformity so that all students are adequately prepared for college entrance exams and higher education. In the biology curriculum, evolution is one of the main themes to be covered. It is taught throughout two years of science study in the district curriculum.

In his complaint, plaintiff contends that the school district's requirement that he teach the evolution theory is a violation of his constitutional rights because evolution is a religious theory. He cites the Establishment Clause of the First Amendment to the United States Constitution as forbidding "the establishment of a religion." It is his argument that the school district commands him to teach evolution as a fact rather than as a theory. Plaintiff takes the position that forcing him to teach the religious belief of evolution as a valid scientific theory would force him to become an unwilling agent of the school district in the

establishment of the religion of secular humanism,[1] in violation of the First Amendment. Peloza claims a First Amendment right to freedom of speech and freedom to teach the truth in the classroom and to teach science.

Peloza further charges the defendants with conspiracy to deny his First, Fifth and Fourteenth Amendment rights and to destroy his professional reputation and career as a public high school teacher. He contends that the defendants, by reason of issuing letters of reprimand to him, are preparing to seek his dismissal as a public high school teacher. He does not claim that he has been dismissed and in fact he is still pursuing his career in this high school. Finally, he complains that even if he is not permitted to teach his theory of creationism in the classroom, he should be permitted to privately discuss religion and his theory of creationism in conversations with students during private, non-instructional time on the campus, during lunch, class breaks, and before and after school hours.

The party defendants include the Capistrano Unified School District and its Board of Trustees of the School District, and

---

1 Plaintiff enclosed literature depicting creationism as the accurate explanation of the origin of life while debunking the doctrine of secular humanism. Secular humanism is the name many academics have tagged to the teaching that man is the center and each person controls his own destiny. Evolution is included among the subjects upon which secular humanism is based. Peloza argues that since a minority of Christians now recognize secular humanism as a religion, it follows that the doctrine of evolution is also a religion. However, evolutionism is the widely accepted scientific explanation of the origin of life. This is the explanation accepted by the nation's school districts in forming their curricula for the sciences. Defendant school district bases its biological science curriculum on the evolutionist theory.

the Principal, Vice-Principal and certain teachers at the high school.

CONTENTIONS OF DEFENDANTS

Defendants ask the Court to take judicial notice of lodged certified copies of the following:

1. The State of California Office of Curriculum Framework and Textbook Development's Instructional Materials and Framework Adoption: Policies and Procedures.

2. California Department of Education's Science Framework for California Public Schools Kindergarten Through Grade Twelve.

It is appropriate that such public documents be judicially noticed. Massachusetts v. Westcott, 431 U.S. 322, 97 S.Ct. 1755, 52 L.Ed.2d 349 (1977).

Defendants contend that the Capistrano Valley High School is part of the Capistrano Unified School District ("District") and that the District in turn is a creation of the legislature of the State of California, and is governed by the California Education Code. Cal.Educ.Code § 35000, et seq. That pursuant to the statutory scheme set forth in that Code, every school district is required to establish a local curriculum for grades 7 through 12. Cal.Educ.Code § 51054. That curriculum must include the biological sciences and must conform to minimum curriculum standards for California. Cal.Educ.Code § 51220(e).

The defendants further claim that the State Department of Education has the responsibility of developing a curriculum framework which is formulated by educators with expertise in the area of curriculum following public debate and input. Each local

district has the responsibility of either implementing or modifying the state curriculum for its own particular needs (§ 51054).

## CURRICULUM OF THE CAPISTRANO UNIFIED SCHOOL DISTRICT

In this case, the curriculum framework for science was revised and approved by the State Board of Education in 1989 after a public hearing. The district follows this framework for its biology courses.

Within this framework, the principle of evolution is listed as one of the major themes of science. The framework states: "In order to teach life science, earth science or astronomy, evolution should be a fundamental, central concept of the curriculum." The defendants further contend that this concept of evolution as taught in the high school classes today is not the simple, traditional Darwinism theory of man's evolution from lower life forms, but encompasses changes in animal life, plants, geologic and astronomic processes. The defendants further claim that the framework notes that the question of "creation science" was "thoroughly studied by leading scientific societies, and rejected as not qualifying as a scientific explanation."

## PLAINTIFF WOULD NOT TEACH THE PRESCRIBED CURRICULUM

The defendants further charge that Peloza chooses to ignore the accepted framework for biology classes and to insist upon using his own religious preference in teaching the theory of creationism to his students. Based upon this conflict, there has resulted considerable controversy between the teacher and the school officials resulting in the defendants causing a continuum of monitoring of plaintiff's classes in order to make a determination of the content of his lectures to students. This resulted in defendant

Thomas R. Anthony on February 7, 1991 issuing a formal written reprimand to plaintiff accusing him of teaching religion in the classroom. This reprimand incorporated in a letter dated October 11, 1990 from defendant Ross Velderraine to plaintiff. The 1991 letter from defendant Anthony issued a formal written warning to plaintiff in which it was stated:

> "You are hereby directed to refrain from any discussion of religion in any of your science classes and to refrain from attempting to influence your students to accept your own personal religious or philosophical beliefs. You are directed to follow the court outlines in the subject area of high school Biology and more specifically in the teaching of evolution. You are further directed to refrain from making any comments about Jesus Christ, about the fact that people who do not believe in Jesus Christ burn in hell, and to refrain from discussing religion or quoting from the Bible during any of your classes. If a student does ask you a question about religion, you are directed to refer them to their parents or to their own clergy person for guidance.
>
> You are further directed to teach evolution as a valid scientific theory and to refrain from any teaching of creationism as a valid scientific theory."

* * * * * *

At the outset it should be understood that my task in this memorandum is not to decide whether the teaching of evolution in the defendant's schools is or is not of itself a violation of the Establishment Clause in the First Amendment of the Constitution. No one has raised this as an issue in this case. The plaintiff in his argument has conceded that this might be a separate issue in another case. Simply put, the issue I must decide is whether Peloza has a constitutional right to conduct himself as a loose cannon in

his classroom or on the campus and teach scientific theories of his own choosing despite the fact that they are not authorized by and are prohibited by the State Board of Education curriculum. I conclude that he has not.

In McLean v. Arkansas Bd. of Education, 529 F.Supp. 1255 (E.D.Ark.1982), the court held that teaching creationism is in fact teaching a religion. This undermines plaintiff's notion that he has a constitutional right to teach it because it is religion. It also debunks his idea that he can teach creationism as a part of academic freedom. In Webster v. New Lenox School Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990), the court was faced with a teacher who sought to vary the curriculum by teaching creationism to his junior high school social studies students. In ruling that the school board sets the curriculum and that the plaintiff must follow it, the Webster court stated as follows:

> "There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please."... The First Amendment is "not a teacher license for uncontrolled expression at variance with established curricular content."

Id. at 1007, quoting from Palmer v. Board of Educ., 603 F.2d 1271, 1273-1274 (7th Cir.1979), cert. den. 444 U.S. 1026, 100 S.Ct. 689, 62 L.Ed.2d 659 (1980).

## DISCUSSION

Plaintiff has stated in his complaint and opposition papers that he does not want to teach creationism. He claims that he only wants to teach science. The problem with his request is that there must be a foundation on which to build. The theory of evolution provides such a foundation. Plaintiff has not comported himself in

the manner of one who only wants to teach science. In the classroom he has stated more than once that he is a creationist and does not believe in the theory of evolution. Additionally, plaintiff has had various conversations with members of his class espousing his Christian views.

## I. SCHOOL DISTRICT HAS NOT VIOLATED PLAINTIFF'S FIRST AMENDMENT RIGHTS

### A. Teachers do not have a Constitutional Right to Teach or not Teach Certain Subjects Based on their Personal Views

The California Education Code establishes that the state gives a broad outline of what should be covered in secondary education and the local districts take those guidelines and develop a curriculum that would best serve the needs of the pupils in their respective areas. Cal.Educ.Code § 51000 et. seq.

There is a compelling state interest for secondary school teachers to adhere to the curriculum set forth by the appropriate school district. Palmer v. Board of Ed. of City of Chicago, 603 F.2d 1271 (7th Cir.1979), cert. den. 444 U.S. 1026, 100 S.Ct. 689, 62 L.Ed.2d 659 (1980). Encompassed in that interest, teachers must adhere to the provided curriculum regardless of their own religious views and practices. Id. at 1274.

In Palmer the plaintiff, a probationary kindergarten teacher, was a member of the Jehovah's Witnesses religion. Before the beginning of classes the teacher informed the principal that because of her religious beliefs she would not be able to teach any subject that had to do with love of country, the flag or other patriotic matters. Id. at 1272. The court held that the teacher had no constitutional right to require students to submit to her views and to "forego a portion of their education they would otherwise be entitled to enjoy." Id. at 1274.

In Webster v. New Lenox School Dist. No. 122, 917 F.2d 1004 (7th Cir.1990), the plaintiff was a social studies teacher in Illinois. A student of Mr. Webster complained that the plaintiff was teaching religion in his class. Plaintiff claimed that he was teaching non-evolutionary theories of creation, and that such theories do not violate the doctrine of separation of church and state. The district court held that plaintiff did not have a right to teach creation science in a public school. Id. at 1006. The lower court stated that a "school board generally has wide latitude in setting the curriculum, provided the school board remains within the boundaries established by the constitution." Id. The Seventh Circuit affirmed, holding that an individual teacher does not have the right to ignore the curriculum compiled by education authorities. Id. at 1008.

The Supreme Court has recognized that a secondary school teacher serves as a "role model for his students, exerting a subtle but important influence over their perceptions and values." Ambach v. Norwick, 441 U.S. 68, 78-79, 99 S.Ct. 1589, 1595, 60 L.Ed.2d 49 (1979). Secondary school students are at a stage of development where they are open to many ideas. However, their intellectual development imposes more responsibility on the local school board to control the curriculum, choose the teachers and regulate their pedagogical methods. Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1304 (7th Cir.1980). "Students in such institutions are impressionable and their attendance is involuntary." Edwards v. Aguillard, 482 U.S. 578, 584, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510 (1987).

The rigid requirements set forth in the Cal.Educ.Code are to insure that high school students receive a well-balanced and thorough course of study. If every teacher chose to teach the areas he or she personally believed in and omitted those topics which are different from beliefs they hold, a curriculum compiled by the state and the local district would be useless.

In Bishop v. Aronov, 926 F.2d 1066 (11th Cir.1991) cert. denied, granted sub nom., Bishop v. Delchamps, --- U.S. ----, 112 S.Ct. 294, 116 L.Ed.2d 238 (1991), the Eleventh Circuit stated that at the university level, those responsible for preparing the curriculum for public education have the right to prohibit a professor from including his religious viewpoints as part of his science curriculum. The court in Bishop refrained from reaching the Establishment Clause questions that were raised. The court stated that "by its effort to avoid endorsement of [plaintiff's] religious ideas in its classrooms" the university's reprimand of plaintiff espousing his religious ideas in the classroom "does not create an establishment of religion." Id. at 1078. The Bishop court held "that the University's restrictions with respect to classroom conduct issued under its authority to control curriculum do not infringe the free speech or free exercise rights of Dr. Bishop." Id. It is well known that institutions of higher education allow their instructors more latitude in choosing their subject matter. University students are more mature and are therefore better able to separate opinion from fact and infuse their own personal beliefs into a given framework. However, the Eleventh Circuit has stated that even on the university level the officials responsible for formulating the curriculum may control what a professor teaches without violating the professor's first amendment right to free speech.

B. Plaintiff's Claim that Evolution is a Religion is Unsupported

Plaintiff has stated that he will not teach evolution because it is a religion and therefore in violation of theestablishment clause of the first amendment.

"It is clearly established in the case law, and perhaps also in common sense, that evolution is not a religion and that teaching evolution does not violate the Establishment clause." McLean v.

Arkansas Bd. of Ed., 529 F.Supp. 1255, 1274 (E.D.Ark.1982). See Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); Willoughby v. Stever, No. 15574-75 (D.D.C. May 18, 1973); aff'd D.C.Cir.1974), cert. denied, 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975); Wright v. Houston Indep. School Dist., 366 F.Supp. 1208 (S.D.Tex.1978), aff'd 486 F.2d 137 (5th Cir.1973), cert. denied, 417 U.S. 969, 94 S.Ct. 3173, 41 L.Ed.2d 1140 (1974). The Supreme Court has recognized that "the term 'religion' has reference to one's view of his relation to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." Davis v. Beason, 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637 (1890), quoted in Wright at 1210, n. 5.

In Wright the court stated:

> Plaintiff's case depends in large measure upon their demonstrating a connection between "religion" as employed in the first amendment, and defendant's approach to the subject of evolution. The Court is convinced that the connection is too tenuous a thread on which to base a first amendment complaint.

Id. at 1210.

C. The Curriculum in Biology is not a Violation of the Establishment Clause

In the case at issue plaintiff states that following the curriculum would be a violation of the establishment clause. In Edwards, the Court stated that it has "been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." Id. 482 U.S. at 583-84, 107 S.Ct. at 2577. "Families entrust public schools with the education of their children, but condition their trust on the understanding that

the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." Id. at 584, 107 S.Ct. at 2577.

Since the evolutionist theory is not a religion, to require an instructor to teach this theory is not a violation of the Establishment Clause. Creationism is associated with "a particular interpretation of the Book of Genesis by a particular religious group." Epperson v. Arkansas, 393 U.S. 97, 103, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968). "The ideas of [creationism] are not merely similar to the literal interpretation of Genesis; they are identical and parallel to no other story of creation." McLean v. Arkansas Bd. of Education, 529 F.Supp. 1255, 1265 (E.D.Ark.1982). "The idea of sudden creation from nothing, or creation ex nihilo, is an inherently religious concept." Id. at 1266.

Evolution is a scientific theory based on the gathering and studying of data, and modification on new data. It is an established scientific theory which is used as the basis for many areas of science. As scientific methods advance and become more accurate, the scientific community will revise the accepted theory to a more accurate explanation of life's origins.

Plaintiff's assertions that the teaching of evolution would be a violation of the Establishment Clause is unfounded.

D. The School District has not Violated Plaintiff's Right to Free Speech

In Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), the Supreme Court examined the extent of a public employee's first amendment rightsto free speech. In Rankin, the Court used a balancing test to determine whether a public employee's speech is protected under the first amendment. The test used is "a balance between the interests of the employee,

as a citizen, in commenting upon matters of public concern and the interest of the state, an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 384, 107 S.Ct. at 2896-97, quoting Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

In the case at issue the school district as the employer has a compelling interest to teach the students within the district the basic materials needed to become contributing citizens. Additionally, as the public employer, the school board does not want to infringe upon the religious beliefs held by individual students and their families. Because of the continuous controversy in the area of religion in schools, plaintiff's statements about evolution and his outward bias toward the creationist view and the Christian religion, may be identified as public concerns. While the school district is not attempting to chill plaintiff's speech, it does have a strong interest in maintaining its secular purpose of educating high school students. Under the framework set forth in Rankin, the interests and concerns of the school district overrule plaintiff's claimed right to free speech.

"In public education, individual's right to free speech is not absolute. It may be limited if exercise of that right materially interferes with the rights of others." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). "The Supreme Court has never held that a teacher has a constitutional right to teach what he sees fit, not to pre-empt parents' decisions regarding what courses their children should take." Mercer v. Michigan State Bd. of Education, 379 F.Supp. 580, 586 (E.D.Mich.1974), aff'd mem., 419 U.S. 1081, 95 S.Ct. 673, 42 L.Ed.2d 678 (1974).

The plaintiff's right to free speech must be balanced "against his student's right to be free of religious influence or indoctrination in the classroom." Roberts v. Madigan, 702 F. Supp.

1505 (D.Colo.1989), aff'd 921 F.2d 1047 (10th Cir.1990). See Board of Education, Island Trees Union Free School District No. 26, et al. v. Pico, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982). Here, the balance seems to lie in the students' favor. The high school students at Capistrano High School have a right to be taught biology without the added comments and religious biases of plaintiff. As shown in defendants motion papers some students have already been effected by plaintiff's teachings. Parents have complained of frustration with the differences between the religious beliefs taught at home and the beliefs of the plaintiff.

Defendants have notified plaintiff that he is not to engage in discourse with students regarding his personal religious beliefs. If a student approaches him with a question about religion, plaintiff is correctly, instructed to refer the student to his or her parents or clergy. This instruction is not a violation of the plaintiff's first amendment right to free speech, but rather a directive to insure that religious dogma is not taught in the public school. Peloza seeks permission of this Court to speak privately to students on campus during lunch hours and class breaks so that he may preach to them his creativism views. He looks upon this as a First Amendment right. I don't see this as an instance of students clamoring to him as a Pied Piper to seek the blessings of his pronouncements. Rather it appears that he desires to do a job of proselytizing pupils in his classroom to swell the numbers of those who will follow him to his lecture during lunch hours or class breaks so he may expound his views to them out of the classroom and thus avoid the accusation of disseminating them while off the school payroll.

DEFERENCE

SCHOOL DISTRICT'S PROHIBITION OF PLAINTIFF DISCUSSING CHRISTIAN BELIEFS OUTSIDE OF THE CLASSROOM IS NOT A VIOLATION OF HIS CONSTITUTIONAL RIGHTS

States and School Boards are generally afforded considerable discretion in operating public schools. Dist. No. 403 v. Fraser, 478 U.S. 675, 683, 106 S.Ct. 3159, 3164, 92 L.Ed.2d 549 (1986). Yet their discretion must be exercised in a manner that comports with the transcendent imperatives of the First Amendment. Board of Education v. Pico, 457 U.S. 853, 864, 102 S.Ct. 2799, 2806, 73 L.Ed.2d 435 (1982). See also Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986); Jordan v. Gardner, 953 F.2d 1137 (9th Cir.1992); 47 Ohio State Law Journal 354 (1986).

Under the California Code an "instructional day" includes the hours before and after school, lunch and class breaks. 5 Cal.Code of Regulations § 5552; Cal.Educ.Code § 44807. See Johnson v. Huntington Beach Union High School District, 68 Cal.App.3d 1, 137 Cal.Rptr. 43 (1977). During these times a teacher is not permitted to discuss religious views with students. In the Equal Access Act, the United States Congress has determined that even though students may meet among themselves, teacher may not become involved in the student discussions. 20 U.S.C. § 4071(c). See Westside Community Schools v. Mergens, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990). I follow this precedent to conclude against plaintiff's right to go through the back door when the front door is closed to him. The district is correct in prohibiting plaintiff from having any religious discussions during the "hours of instruction."

## II. PLAINTIFF CLAIMS DUE PROCESS VIOLATIONS VIA THE FIFTH AND THE FOURTEENTH AMENDMENTS

### A. No Violation of any Property Interest

A complainant may allege that he has been deprived of a property right if he can prove that his legal rights or status have

been removed or significantly altered. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). In the case at issue plaintiff has not lost a property right. He has received reprimands from his superiors but he has not lost his job. Plaintiff does not have a claim as to a loss of property rights.

B. Plaintiff has not Been Deprived of any Liberty Interest

In Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), the Court stated that if the state makes statements that seriously damage a person's standing and forecloses his opportunity to find other employment, adequate notice and a hearing may be necessary to clear one's name. However, statements which affect one's reputation or tortious defamation do not deprive one of a liberty interest. Hayes v. Phoenix-Talent School Dist., 893 F.2d 235 (9th Cir.1990).

As defendants point out, the statements made to plaintiff and the editorials in the paper were merely comments by various people within the school and District who disagree with plaintiff's teaching methods. Plaintiff has not established a deprivation of his liberty interest.

III. INDIVIDUAL DEFENDANTS SHOULD BE DISMISSED

Plaintiff has named a series of individual defendants who have made statements in opposition to plaintiff's teaching methods. These comments do not infringe on plaintiff's right toteach. In fact the individuals are only exercising their first amendment right to free speech. The reprimands received by plaintiff do not violate his constitutional rights.

## IV. REMAINING CLAIMS TO BE DISMISSED

Once plaintiff's constitutional claims are dismissed, the remaining state causes of action should be dismissed for lack of jurisdiction.

## CONCLUSION

Based on the discussion above, plaintiff's constitutional claims via 42 U.S.C. § 1983 and 42 U.S.C. § 1985 are dismissed on the grounds that plaintiff has not stated a claim for which relief can be granted. Defendants' motion is to be GRANTED.

[Argued and Submitted June 9, 1993.]
[Decided July 25, 1994.]
[Opinion Ordered Withdrawn Pending further Order of Court Sept. 20, 1994.]

John E. PELOZA, Plaintiff-Appellant,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT; Board of Trustees of the Capistrano Unified School District; Paul B. Haseman; Crystal Kochendorfer; Marlene M. Draper; Annette B. Gude; Kathryn I. Itzel; E.G. Kopp; A. Edward Westberg; Jerome R. Thornsley; William D. Eller, Geraldine Jaffe; Thomas R. Anthony; Ross Velerraine; James Corbett; Paul Pflueger; Ray Panici; Tim Dunn; William Redding, Defendants-Appellees.

John E. PELOZA, Plaintiff-Appellant,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT; Board of Trustees of the Capistrano Unified School District; Paul B. Haseman; Crystal Kochendorfer; Marlene M. Draper; Annette B. Gude; Kathryn I. Itzel; E.G. Kopp; A. Edward Westberg; Jerome R. Thornsley, et al., Defendants-Appellees.

Nos. 92-55228, 92-55644.
United States Court of Appeals,
Ninth Circuit.

Cyrus Zal, Folsom, CA, for plaintiff-appellant.

David C. Larsen, Jeffrey Wertheimer, Rutan & Tucker, Costa Mesa, CA, for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before: FLETCHER, POOLE and THOMPSON, Circuit Judges.

Opinion by Judge DAVID R. THOMPSON; Partial Concurrence and Partial Dissent by Judge POOLE.

DAVID R. THOMPSON, Circuit Judge:

John E. Peloza is a high school biology teacher. He sued the Capistrano Unified School District and various individuals connected with the school district under 42 U.S.C. § 1983. He alleges in his complaint that the school district requires him to teach "evolutionism" and that evolutionism is a religious belief system. He alleges this requirement violates his rights under the (1) Free Speech Clause of the First Amendment; (2) Establishment Clause of the First Amendment; (3) Due Process Clause of the Fourteenth Amendment; and (4) Equal Protection Clause of the Fourteenth Amendment[1]. He also alleges the defendants conspired to violate these constitutional rights and attempted by harassment and intimidation to force him to teach evolutionism. He alleges they did this because they have a class-based animus against practicing Christians, a class of which he is a member, in violation of 42 U.S.C. § 1985(3).

He also alleges state law claims for violation of California's Tom Bane Civil Rights Act, Cal.Civ.Code § 52.1 (which provides a cause of action for interference with an individual's enjoyment of rights secured by the United States or California Constitution or by federal or state law), and for intentional infliction of emotional distress.

The district court 782 F. Supp. 1412 dismissed the federal

---

1 On appeal, Peloza abandoned his equal protection argument.

claims for failure to state a claim upon which relief could be granted. Fed.R.Civ.P. 12(b)(6). The court then dismissed the state claims for lack of jurisdiction. The court also determined that the action was frivolous. Relying on Rule 11 of the Federal Rules of Civil Procedure and 42 U.S.C. § 1988, the court ordered Peloza and his attorney to pay approximately $32,000 to the defendants for their attorney fees and costs.

Peloza appeals. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, reverse in part and remand for further proceedings.

## THE ALLEGATIONS OF THE COMPLAINT

The following summarizes the allegations of Peloza's complaint: Peloza is a biology teacher in a public high school, and is employed by the Capistrano Unified School District. He is being forced by the defendants (the school district, its trustees and individual teachers and others) to proselytize his students to a belief in "evolutionism" "under the guise of [its being] a valid scientific theory." Evolutionism is an historical, philosophical and religious belief system, but not a valid scientific theory. Evolutionism is one of "two world views on the subject of the origins of life and of the universe." The other is "creationism" which also is a "religious belief system." Peloza does not wish "to promote either philosophy or belief system in teaching his biology class." "The general acceptance of . . . evolutionism in academic circles does not qualify it or validate it as a scientific theory." Peloza believes that the defendants seek to dismiss him due to his refusal to teach evolutionism. His first amendment rights have been abridged by interference with his right "to teach his students to differentiate between a philosophical, religious belief system on the one hand and a true scientific theory on the other."

Peloza further alleges he has been forbidden to discuss

religious matters with students the entire time that he is on the school campus even if a conversation is initiated by a student and the discussion is outside of class time.

He also alleges that the defendants have conspired to destroy and damage his professional reputation, career and position as a public school teacher. He has been reprimanded in writing for proselytizing students and teaching religion in the classroom. His inquiries as to whether he is being required to teach evolution as "fact" or "as the only valid scientific theory" have not been answered directly. He has not taught creationism in his classroom. He has been wrongly accused in the school newspaper and in the public press of teaching religion in his science class. He has been harassed by the defendant teachers and has received a formal written reprimand from defendant Thomas R. Anthony, the school principal, wrongly accusing him of proselytizing his students and teaching religion in the classroom, directing him to teach evolution as the only valid scientific theory, and forbidding him from teaching creationism as a valid scientific theory. Anthony further directed him not to discuss religion or attempt to convert students to Christianity while on campus. He has been criticized in a petition signed by faculty members for threatening litigation over the rights of faculty members to speak fully to the news media and each other.

## STANDARDS OF REVIEW

We review do novo the grant of a Rule 12(b)(6) motion. Oscar v. University Students Co-operative Ass'n, 965 F.2d 783, 785 (9th Cir.) (en banc), cert. denied, --- U.S. ----, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992). We review the award of attorney fees for abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 2460-61, 110 L.Ed.2d 359 (1990) (under Fed.R.Civ.P. 11); Benigni v. City of Hemet, 879 F.2d 473, 480 (9th Cir.1988) (under 42 U.S.C. § 1988).

## DISCUSSION

### I
### The Section 1983 Claim

#### A. The Establishment Clause

To withstand an Establishment Clause challenge,[2] a state statute, policy or action (1) must have a secular purpose; (2) must, as its primary effect, neither advance nor inhibit religion; and (3) must not foster an excessive government entanglement with religions. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

Peloza's complaint alleges that the school district has violated the Establishment Clause "by pressuring and requiring him to teach evolutionism, a religious belief system, as a valid scientific theory." Complaint at 19-20. Evolutionism, according to Peloza, "postulates that the 'higher' life forms . . . evolved from the 'lower' life forms . . . and that life itself 'evolved' from non-living matter." Id. at 2. It is therefore "based on the assumption that life and the universe evolved randomly and by chance and with no Creator involved in the process." Id. Peloza claims that evolutionism is not a valid scientific theory because it is based on events which "occurred in the non-observable and non-recreatable past and hence are not subject to scientific observation." Id. at 3. Finally, in his appellate brief he alleges that the school district is requiring him to teach evolutionism not just as a theory, but rather as a fact.

---

2 The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion...." The Fourteenth Amendment incorporates the Establishment Clause's prohibitions against offending state action as well. Board of Education v. Pico, 457 U.S. 853, 864, 102 S.Ct. 2799, 2807, 73 L.Ed.2d 435 (1982).

Peloza's complaint is not entirely consistent. In some places he seems to advance the patently frivolous claim that it is unconstitutional for the school district to require him to teach, as a valid scientific theory, that higher life forms evolved from lower ones. At other times he claims the district is forcing him to teach evolution as fact. Were we to disregard Peloza's liberal use of "ism" and the adjectival phrase "a religious belief system,"[3] and to ignore his occasional use of "fact" instead of "valid scientific theory," we would not hesitate to hold his claim frivolous. On a motion to dismiss, however, we are required to read the complaint charitably, to take all well-pleaded facts as true, and to assume that all general allegations embrace whatever specific facts might be necessary to support them. Lujan v. Nat'l Wildlife Federation, 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990); Abramson v. Brownstein, 897 F.2d 389, 391 (9th Cir.1990).

Charitably read, Peloza's complaint possibly contains two Establishment Clause claims. The first is that the school district's actions establish a state-supported religion of evolutionism, or more generally of "secular humanism." See Complaint at 2-4, 20. According to Peloza's complaint, all persons must adhere to one of two religious belief systems concerning "the origins of life and of the universe:" evolutionism, or creationism. Id. at 2. Thus, the school district, in teaching evolutionism, is establishing a state-supported "religion."

We reject this claim because neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are "religions" for Establishment Clause purposes.

---

3 E.g., as in "the religious belief system of evolutionism," Complaint at 4, 18, 23, and "evolutionism, a religious belief system," id. at 19, 20, 22, 23.

Indeed, both the dictionary definition of religion[4] and the clear weight of the caselaw[5] are to the contrary. The Supreme Court has held unequivocally that while the belief in a divine creator of the universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not. Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (holding unconstitutional, under Establishment Clause, Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act"). Parsing Peloza's various formulations of his claims, however, we read them as possibly alleging a second claim, along the following lines: The school district forced Peloza to teach the belief that life and the universe came into existence without a creator, and to teach this belief as if it were undisputed fact rather than scientific theory.

Such actions would violate the Establishment Clause's mandate of "government neutrality between religion and religion, and between religion and non-religion." Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968) (emphasis added). "[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion,

---

4 According to Webster's, religion is the "belief in and reverence for a supernatural power accepted as the creator and governor of the universe." Webster's II New Riverside University Dictionary 993 (1988).

5 See Smith v. Board of School Com'rs of Mobile County, 827 F.2d 684, 690-95 (11th Cir.1987) (refusing to adopt district court's holding that "secular humanism" is a religion for Establishment Clause purposes; deciding case on other grounds); United States v. Allen, 760 F.2d 447, 450-51 (2d Cir.1985) (quoting Tribe, American Constitutional Law 827-28 (1978), for the proposition that, while "religion" should be broadly interpreted for Free Exercise Clause purposes, "anything 'arguably non-religious' should not be considered religious in applying the establishment clause").

thus 'preferring those who believe in no religion over those who do believe.'" Abington School Dist. v. Schempp, 374 U.S. 203, 225, 83 S.Ct. 1560, 1573, 10 L.Ed.2d 844 (1963). Put another way, if the school district supported atheism as Peloza has alleged, it would violate the second prong of the Lemon test, which requires that a state policy "neither advance[] nor inhibit [ ] religion." Lemon, 403 U.S. at 612, 91 S.Ct. at 2111 (emphasis added).

The district court dismissed this claim by finding that the school district did not require Peloza to teach atheistic evolutionism as a fact, but rather simply required him to teach the scientific theory of evolution. In order to make this factual determination, the district court took notice of the school district's policy "Framework," as well as of a reprimand letter from Peloza's principal, Anthony. Neither the Framework nor the relevant part of Anthony's letter was included in the complaint. While we are not certain Peloza is correct that the district court erred in going outside the four corners of the complaint to consider these items,[6] we conclude that at the Rule 12(b)(6) stage it erred in relying on them to rebut Peloza's allegations to the contrary. Weighing competing factual claims, and finding that some claims are not supported, is simply not appropriate on a motion to dismiss; rather, the court must accept all of Peloza's well-pleaded factual allegations as true. Abramson, 897 F.2d at 391.

---

6 Compare Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) ("[g]enerally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion") with Branch v. Tunnell, 14 F.3d 449 (9th Cir.1994), at 453 ("a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned"), and Emrich v. Touche Ross & Co., 846 F.2d 1190, 1198 (9th Cir.1988) (on motion to dismiss, court may take judicial notice of documents which are "a matter of general public record").

We conclude that the district court erred in granting the motion to dismiss Peloza's EstablishmentClause claim, and remand this cause of action for further proceedings. On remand, it would be appropriate for the district court to convert the school district's motion to dismiss into a motion for summary judgment. If it does so, it must give the parties notice and a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12(b). If it turns out that all the school district required was that Peloza teach evolution as scientific theory, no Establishment Clause violation occurred.[7]

B. Free Speech

Peloza alleges the school district ordered him to refrain from discussing his religious beliefs with students during "instructional time," and to tell any students who attempted to initiate such conversations with him to consult their parents or clergy. He claims the school district, in the following official reprimand, defined "instructional time" as any time the students are on campus, including lunch break and the time before, between, and after classes:

> You are hereby directed to refrain from any attempt to convert students to Christianity or initiating conversations about your religious beliefs during instructional time, which the District believes includes any time students are

---

7 The only viable claim we have found among the several claims asserted by Peloza would be very difficult to support factually. To defeat a motion for summary judgment, Peloza would have to establish issues of fact as to whether the school district ignored its own policies and required him to teach that life and the universe came into existence without a creator, and whether the school district required him to teach such ideas as fact rather than as scientific theory.

> required to be on campus as well as the time students immediately arrive for the purposes of attending school for instruction, lunch time, and the time immediately prior to students' departure after the instructional day.

Complaint at 16. Peloza seeks a declaration that this definition of instructional time is too broad, and that he should be allowed to participate in student-initiated discussions of religious matters when he is not actually teaching class.[8]

The school district's restriction on Peloza's ability to talk with students about religion during the school day is a restriction on his right of free speech. Nevertheless, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506-07, 89 S.Ct. 733, 736-37, 21 L.Ed.2d 731 (1969). "[T]he interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment...." Lamb's Chapel v. Center Moriches Union Free School Dist., --- U.S. ----, ----, 113 S.Ct. 2141, 2148, 124 L.Ed.2d 352 (1993) (quoting Widmar v. Vincent, 454 U.S. 263, 271, 102 S.Ct. 269, 275, 70 L.Ed.2d 440 (1981)). This principle applies in this case. The school district's interest in avoiding an

---

8 The dissent claims this interpretation impermissibly narrows the scope of Peloza's complaint. However, the very sentence quoted by the dissent, Dissent at p. 8180, focuses not on the definition of "religious matters," but on the definition of "instructional time." We agree with the dissent that a complaint must be read charitably at the Rule 12(b)(6) stage. However, a reviewing court need not go so far as to invent claims not within the reasonable intendment of the complaint.

Establishment Clause violation trumps Peloza's right to free speech.

While at the high school, whether he is in the classroom or outside of it during contract time, Peloza is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. In sum, it would flunk all three parts of the test articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). See Roberts v. Madigan, 921 F.2d 1047, 1056-58 (10th Cir.1990) (teacher could be prohibited from reading Bible during silent reading period, and from stocking two books on Christianity on shelves, because these things could leave students with the impression that Christianity was officially sanctioned), cert. denied, --- U.S. ----, 112 S.Ct. 3025, 120 L.Ed.2d 896 (1992).

The district court did not err in dismissing the part of Peloza's section 1983 claim that was predicated on an alleged violation of his right to free speech under the First Amendment.

C. Due Process

Peloza alleges that some of the defendants made defamatory statements to and about him, and that these statements damaged his reputation. He alleges this was state action which violated his right to due process under the Fourteenth Amendment.

To state a claim under 42 U.S.C. § 1983 based on an alleged violation of due process, Peloza must allege a deprivation of a life, liberty or property interest within the meaning of the Fourteenth Amendment's Due Process Clause. Board of Regents v. Roth, 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972). The injury Peloza alleges here is to his reputation. An injury to reputation does not deprive Peloza of any interest in life. The district court concluded that it did not deprive him of a liberty or a property interest. Peloza concedes that his interest in his reputation is not a property interest. He argues, however, that the alleged injury to his reputation deprived him of a liberty interest sufficient to state a claim under section 1983 based on a due process violation. We disagree.

In Siegert v. Gilley, --- U.S. ----, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), the Court laid to rest the notion that reputation alone is a sufficient interest to give rise to due process rights. In that case, Siegert, a psychologist working for the federal government, resigned from his job in Washington, D.C. to avoid being fired. Id. at ----, 111 S.Ct. at 1791. He applied for a job in an Army hospital in Germany which required that he be "credentialed." This involved asking his former employer for information about him. Id. His former supervisor respondedto the request for information with a letter which said "that he 'consider[ed] Dr. Siegert to be both inept and unethical, perhaps the least trustworthy individual I have supervised in my thirteen years [here].' " Id. The Court held that Siegert had no cause of action for deprivation of liberty under the Due Process Clause because "injury to reputation by itself was not a 'liberty' interest...." Id. at ----, 111 S.Ct. at 1794; see also Paul v. Davis, 424 U.S. 693, 712, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976); Cooper v. Dupnik, 924 F.2d 1520, 1532 (9th Cir.1991), cert. denied, --- U.S. ----, 113 S.Ct. 407, 121 L.Ed.2d 332 (1992); Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 17.4(d) (1992).

Like Dr. Siegert's, Peloza's allegations of injury to his reputation are insufficient to support a claim for deprivation of a liberty interest under section 1983. Peloza's citations to dicta in pre-Paul cases that suggest reputation alone is protected in this context are unavailing. The district court did not err in dismissing the part of Peloza's section 1983 claim which was predicated on an alleged violation of his right to due process under the Fourteenth Amendment.

II

The Section 1985(3) Claim

In support of his claim under 42 U.S.C. § 1985(3), Peloza alleges in his complaint that the defendants conspired to deprive him of equal protection of the laws under the Fourteenth Amendment; free speech under the First and Fourteenth Amendments; life, liberty "or" property without due process of law under the Fifth and Fourteenth Amendments; and the free exercise of his religious beliefs under the First and Fourteenth Amendments. In addition, he alleges the defendants violated his rights under the Establishment Clause of the First and Fourteenth Amendments. He alleges that the defendants engaged in this conspiracy pursuant to their class-based animus against practicing Christians.[9]

As we stated previously, Peloza's allegations are insufficient to support a claim based on a violation of his constitutional rights of free speech and due process. Accordingly, his allegations of a conspiracy to violate these constitutional rights do not state a claim. See Great American Fed. S. & L. Ass'n v. Novotny, 442 U.S. 366, 372, 99 S.Ct. 2345, 2349, 60 L.Ed.2d 957

---

9 As with his equal protection claim under section 1983, Peloza appears to have dropped his equal protection claim from his appeal to this court.

(1979) ("Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates."). Because Peloza failed to allege a conspiracy to do something that would violate his free speech or due process rights, his section 1985(3) claim predicated on a violation of these rights fails. We do not decide whether free speech and due process rights fall within the protection of section 1985(3).[10]

Because we remand for further proceedings on Peloza's section 1983 claim predicated on a violation of his constitutional rights under the Establishment Clause, and because the district court may resolve Peloza's case on summary judgment without reaching the freedom of religion issues of his section 1985(3) claim, we do not decide at this time whether Peloza's constitutional rights under the Establishment and Free Exercise Clauses fall within the protection of section 1985(3).[11]

---

10 See United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 830, 103 S.Ct. 3352, 3357, 77 L.Ed.2d 1049 (1983) (free speech rights protected by section 1985 so long as the state is involved in the conspiracy alleged). As to due process rights, there appears to be some confusion within this circuit. Older cases have stated that section 1985(3) provides no remedy for violation of due process rights, Cohen v. Norris, 300 F.2d 24, 28 (9th Cir.1962) (dicta); Mitchell v. Greenough, 100 F.2d 184, 187 (9th Cir.1938) (holding), cert. denied, 306 U.S. 659, 59 S.Ct. 788, 83 L.Ed. 1056 (1939). In some more recent cases, we have allowed claims of due process violations to proceed under section 1985(3) without comment. See Judie v. Hamilton, 872 F.2d 919, 924 (9th Cir.1989); Padway v. Palches, 665 F.2d 965, 969 (9th Cir.1982).

11 See Taylor v. Gilmartin, 686 F.2d 1346, 1358 (10th Cir.1982) (First Amendment freedom of religion protected by section 1985(3)), cert. denied, 459 U.S. 1147, 103 S.Ct. 788, 74 L.Ed.2d 994, and cert. denied, 463 U.S. 1229, 103 S.Ct. 3570, 77 L.Ed.2d 1411 (1983); Action v. Gannon, 450 F.2d 1227, 1234 (8th Cir.1971) (same); Cooper v. Molko,

## III
## State Law Claims

Peloza's state law claims were pendent to his federal claims and were dismissed for lack of jurisdiction when the district court dismissed all the federal claims. Because we have reinstated Peloza's federal claim under 42 U.S.C. § 1983 insofar as it purports to allege a violation of Peloza's constitutional rights under the Establishment Clause, the district court will have jurisdiction once again to consider Peloza's state law claims.

## IV
## Attorney Fees

Peloza contends the district court erred in awarding the defendants costs and attorney fees of approximately $32,000. This award, made by the district court under Federal Rule of Civil Procedure 11 and 42 U.S.C. § 1988, was appropriate if Peloza's complaint is frivolous. Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 422, 98 S.Ct. 694, 700-01, 54 L.Ed.2d 648 (1978) (under civil rights statutes); Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir.1990) (en banc) (under Fed.R.Civ.P. 11). Peloza's complaint is not frivolous. The district court erred in dismissing it for failure to state a claim. Moreover, some of the issues he raises present important questions of first impression in this circuit. His free speech claim involves substantial questions and requires the balancing of rights of free speech against the Establishment Clause, a matter upon which the Supreme Court recently commented in Lamb's Chapel. Accordingly, we reverse the district court's award of attorney fees

---

512 F.Supp. 563, 570 (N.D.Cal.1981) (same); but see Africa v. Anderson, 510 F.Supp. 28, 30 (E.D.Penn.1980) (freedom of religion not protected by section 1985(3)).

and costs to the defendants.

## V
## CONCLUSION

We reverse the district court's dismissal of Peloza's complaint for failure to state a claim under 42 U.S.C. § 1983. If Peloza is being required to teach religion as he alleges, rather than evolution as a scientific theory, his complaint is sufficient to survive a motion to dismiss. The district court on remand may choose to convert the motion to dismiss to one for summary judgment. If it determines that there is no genuine factual dispute as to whether Peloza was required to teach evolution as a scientific theory, summary judgment would be appropriate. In this event, the district court would not have to decide whether evolutionism as alleged by Peloza is a religion.

The district court correctly dismissed Peloza's section 1983 claim to the extent it is based on allegations of a violation of his constitutional rights to free speech and due process. He failed to allege sufficient facts to state a violation of these rights. The district court also correctly dismissed Peloza's claim under 42 U.S.C. § 1985(3) to the extent that claim is predicated on an alleged violation of Peloza's constitutional rights to free speech and due process, because he failed to allege facts sufficient to state a violation of those rights, assuming, without deciding, that they fall within the protection of section 1985(3). Because the district court may resolve Peloza's entire case on summary judgment, we do not decide at this time whether his allegations of a conspiracy to violate his constitutional rights under the Establishment and Free Exercise Clauses are sufficient to state a claim under 42 U.S.C. § 1985(3).

We reinstate Peloza's state law claims. We reverse the district court's award of attorney fees to the defendants. Finally,

we reject Peloza's request that we reassign this cause to a district judge other than Judge Williams, who ruled on the motion to dismiss. Instead, we invite Judge Williams to consider for himself whether he should reassign this cause to another district judge. Any further appeals in this cause shall be calendared before the panel of Judges Fletcher, Poole and Thompson.

AFFIRMED in part, REVERSED in part, and REMANDED. Peloza shall recover from the appellees one-half his costs on appeal; the parties shall otherwise bear their own costs on appeal.

POOLE, Circuit Judge, concurring in part and dissenting in part:

I am in agreement with the majority's resolution of John Peloza's Establishment Clause and Due Process Clause claims. However, because I believe we can dismiss Peloza's free speech claims only by turning a deaf ear to the procedural posture of this case, I respectfully dissent from parts I.B and II of the majority opinion.

I

Schoolteacher John Peloza seeks a declaratory judgment permitting him to "respond[] to student-initiated inquiries ... regarding religion" during contract time. The majority opinion concludes that if Peloza's discussions would constitute an establishment of religion, the District may permissibly limit those discussions, even though such limitations restrict Peloza's free speech. With this I have no quarrel. But the majority's premise is that any discussions Peloza might have do constitute such an establishment, and I am unpersuaded that we may reach such a conclusion in the case's present posture. This is an appeal from the granting of a Rule 12(b)(6) motion. As such, we are not permitted to affirm dismissal of the complaint "unless it appears beyond

doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Love v. United States, 915 F.2d 1242, 1245 (9th Cir.1989). At this stage, we know almost nothing about what past or future discussions might involve. I can imagine a wide range of circumstances and questions "regarding religion" which Peloza could permissibly answer without violating the Establishment Clause. For example, a student might come to a teacher during lunch and ask about Malcolm X or Martin Luther King's religious beliefs, and how and why they evolved, or about the origins of Islam, or what the seven great religions of the world were. Such questions would certainly be "regarding religion," student-initiated, and during contract time. As such, they fall within the class of discussions Peloza seeks to be permitted, yet it is hard to see how the descriptive role a teacher would have in responding to these questions would work any violation of the Establishment Clause.

The majority holding only makes sense if we presume that we know what kinds of questions are being asked and what kinds of answers Peloza would give. In the posture of this case, where we must reverse if there are any facts Peloza could conceivably prove which would entitle him to relief, this is a presumption we are forbidden from making. As a result, the majority holding means that any response to a student-initiated inquiry "regarding religion" during contract time, other than "Ask someone else," works a violation of the Establishment Clause. I cannot join in such a broad legal holding, and indeed the case law forbids it:

> In each case, the inquiry calls for line-drawing; no fixed, per se rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application.... The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test.

> The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Lemon [v. Kurtzman ], 403 U.S. [602, 614 [91 S.Ct. 2105, 2112, 29 L.Ed.2d 745] (1971) ].

Lynch v. Donnelly, 465 U.S. 668, 678-79, 104 S.Ct. 1355, 1361-62, 79 L.Ed.2d 604 (1984).

Roberts v. Madigan, 921 F.2d 1047 (10th Cir.1990), upon which the majority relies, is not to the contrary. There, the court had before it a host of particulars: the conduct at issue involved a teacher displaying religious books and a poster reading "You have only to open your eyes to see the hand of God" in the classroom. Id. at 1049. That court also had the benefit of a district court factual determination that the conduct "created the appearance that [the teacher] was seeking to advance his religious views." Id. As this case stands, we know far less.

The majority impermissibly attempts to narrow the scope of Peloza's complaint by relying on a written warning from the school district which Peloza has incorporated into the complaint. The letter forbids Peloza from "attempt[ing] to convert students to Christianity or initiating conversations about your religious beliefs." Complaint at P 45. Were this all that the complaint said, I would have little trouble joining the majority. But the complaint alleges more; it contends that "the school district ... has directed Plaintiff not to discuss any religious matters during any of this 'instructional time,' including student-initiated conversations regarding religion during lunch, class breaks, and before and after school hours." Complaint at P 3. This allegation we must take as true. If all that lies behind it is the far narrower warning the majority cites, then Peloza's case will not be long for this world. But we may not presume that this is so.

I believe that, in a broad range of cases, the majority and

I could agree about what would or would not constitute a violation of the Establishment Clause. But the majority errs in presuming to know that what is at stake here is Peloza's right to "discuss[ ] his religious beliefs" with students. In doing so, it ignores the fact that this is a Rule 12(b)(6) case. More generally, it gives short shrift to the possibility that we may well be limiting free speech more broadly than the state's compelling interest in avoiding an establishment of religion would warrant.

II

I join in the majority's part II insofar as it dismisses Peloza's § 1985(3) due process claim based on his failure to properly allege a violation of his due process rights and remands his § 1985(3) claims based on Establishment Clause and free exercise rights. However, because I conclude that Peloza's free speech claim should not have been dismissed, I would also remand, rather than dismiss, his § 1985(3) claim based on alleged free speech violations.

III

Religion has been used to justify the suppression of speech for centuries. See Everson v. Board of Ed., 330 U.S. 1, 8-10, 67 S.Ct. 504, 508-09, 91 L.Ed. 711 (1947). With the development of a vigorous First Amendment jurisprudence, we have quelled some of the worst abuses. But points of tension remain. We must thus remain vigilant to ensure that in our rush to preserve certain fundamental rights, we do not trample others. Caution is of the essence; only through a methodical and fact-specific jurisprudence can we hope to achieve a proper accommodation.

For the reasons stated above, I respectfully dissent.

[Argued and Submitted June 9, 1993.]
[Filed July 25, 1994.]
[Opinion Withdrawn Sept. 20, 1994.]
[Decided Oct. 4, 1994.]

John E. PELOZA, Plaintiff-Appellant,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT; Board of Trustees of the Capistrano Unified School District; Paul B. Haseman; Crystal Kochendorfer; Marlene M. Draper; Annette B. Gude; Kathryn I. Itzel; E.G. Kopp; A. Edward Westberg; Jerome R. Thornsley; William D. Eller; Geraldine Jaffe; Thomas R. Anthony; Ross Velderraine; James Corbett; Paul Pflueger; Ray Panici; Tim Dunn; William Redding, Defendants-Appellees.

John E. PELOZA, Plaintiff-Appellant,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT; Board of Trustees of the Capistrano Unified School District; Paul B. Haseman; Crystal Kochendorfer; Marlene M. Draper; Annette B. Gude; Kathryn I. Itzel; E.G. Kopp; A. Edward Westberg; Jerome R. Thornsley, et al., Defendants-Appellees.

Nos. 92-55228, 92-55644.

United States Court of Appeals,
Ninth Circuit.

Cyrus Zal, Folsom, CA, for plaintiff-appellant.

David C. Larsen and Jeffrey Wertheimer, Rutan & Tucker,

Costa Mesa, CA, for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before: FLETCHER, POOLE and THOMPSON, Circuit Judges.

Per Curiam; Partial Concurrence and Partial Dissent by Judge POOLE.

PER CURIAM:

John E. Peloza is a high school biology teacher. He sued the Capistrano Unified School District and various individuals connected with the school district under 42 U.S.C. § 1983. He alleges in his complaint that the school district requires him to teach "evolutionism" and that evolutionism is a religious belief system. He alleges this requirement violates his rights under the (1) Free Speech Clause of the First Amendment; (2) Establishment Clause of the First Amendment; (3) Due Process Clause of the Fourteenth Amendment; and (4) Equal Protection Clause of the Fourteenth Amendment.[1]

He also alleges the defendants conspired to violate these constitutional rights and attempted by harassment and intimidation to force him to teach evolutionism. He alleges they did this because they have a class-based animus against practicing Christians, a class of which he is a member, in violation of 42 U.S.C. § 1985(3).

He also alleges state law claims for violation of California's

---

1 On appeal, Peloza abandoned his equal protection argument.

Tom Bane Civil Rights Act, Cal.Civ.Code § 52.1 (which provides a cause of action for interference with an individual's enjoyment of rights secured by the United States or California Constitution or by federal or state law), and for intentional infliction of emotional distress.

The district court dismissed the federal claims for failure to state a claim upon which relief could be granted. Fed.R.Civ.P. 12(b)(6). The court then dismissed the state claims for lack of jurisdiction. The court also determined that the action was frivolous. Relying on Rule 11 of the Federal Rules of Civil Procedure and 18 U.S.C. § 1988, the court ordered Peloza and his attorney to pay approximately $32,000 to the defendants for their attorney fees and costs.

Peloza appeals. We have jurisdiction under 28 U.S.C. § 1291. We affirm, except as to attorneys' fees.

## THE ALLEGATIONS OF THE COMPLAINT

The following summarizes the allegations of Peloza's complaint: Peloza is a biology teacher in a public high school, and is employed by the Capistrano Unified School District. He is being forced by the defendants (the school district, its trustees and individual teachers and others) to proselytize his students to a belief in "evolutionism" "under the guise of [its being] a valid scientific theory." Evolutionism is an historical, philosophical and religious belief system, but not a valid scientific theory. Evolutionism is one of "two world views on the subject of the origins of life and of the universe." The other is "creationism" which also is a "religious belief system." "The belief system of evolutionism is based on the assumption that life and the universe evolved randomly and by chance and with no Creator involved in the process. The world view and belief system of creationism is based on the assumption that a Creator created all life and the

entire universe." Peloza does not wish "to promote either philosophy or belief system in teaching his biology class." "The general acceptance of ... evolutionism in academic circles does not qualify it or validate it as a scientific theory." Peloza believes that the defendants seek to dismiss him due to his refusal to teach evolutionism. His first amendment rights have been abridged by interference with his right "to teach his students to differentiate between a philosophical, religious belief system on the one hand and a true scientific theory on the other."

Peloza further alleges he has been forbidden to discuss religious matters with students the entire time that he is on the school campus even if a conversation is initiated by a student and the discussion is outside of class time.

He also alleges that the defendants have conspired to destroy and damage his professional reputation, career and position as a public school teacher. He has been reprimanded in writing for proselytizing students and teaching religion in the classroom. His inquiries as to whether he is being required to teach evolution as "fact" or "as the only valid scientific theory" have not been answered directly. He has not taught creationism in his classroom. He has been wrongly accused in the school newspaper and in the public press of teaching religion in his science class. He has been harassed by the defendant teachers and has received a formal written reprimand from defendant Thomas R. Anthony, the school principal, wrongly accusing him of proselytizing his students and teaching religion in the classroom, directing him to teach evolution as the only valid scientific theory, and forbidding him from teaching creationism as a valid scientific theory. Anthony further directed him not to discuss religion or attempt to convert students to Christianity while on campus. He has been criticized in a petition signed by faculty members for threatening litigation over the rights of faculty members to speak fully to the news media and each other.

## STANDARDS OF REVIEW

We review do novo the grant of a Rule 12(b)(6) motion. Oscar v. University Students Co-operative Ass'n, 965 F.2d 783, 785 (9th Cir.) (en banc), cert. denied, --- U.S. ----, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992). We review the award of attorney fees for abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S.Ct. 2447, 2460-61, 110 L.Ed.2d 359 (1990) (under Fed.R.Civ.P. 11); Benigni v. City of Hemet, 879 F.2d 473, 480 (9th Cir.1988) (under 42 U.S.C. § 1988).

## DISCUSSION

### I
### The Section 1983 Claim

### A. The Establishment Clause

To withstand an Establishment Clause challenge,[2] a state statute, policy or action (1) must have a secular purpose; (2) must, as its primary effect, neither advance nor inhibit religion; and (3) must not foster an excessive government entanglement with religions. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

Peloza's complaint alleges that the school district has violated the Establishment Clause "by pressuring and requiring him to teach evolutionism, a religious belief system, as a valid scientific

---

2 The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion...." The Fourteenth Amendment incorporates the Establishment Clause's prohibitions against offending state action as well. Board of Education v. Pico, 457 U.S. 853, 864, 102 S.Ct. 2799, 2806-07, 73 L.Ed.2d 435 (1982).

theory." Complaint at 19-20. Evolutionism, according to Peloza, "postulates that the 'higher' life forms ... evolved from the 'lower' life forms ... and that life itself 'evolved' from non-living matter." Id. at 2. It is therefore "based on the assumption that life and the universe evolved randomly and by chance and with no Creator involved in the process." Id. Peloza claims that evolutionism is not a valid scientific theory because it is based on events which "occurred in the non-observable and non-recreatable past and hence are not subject to scientific observation." Id. at 3. Finally, in his appellate brief he alleges that the school district is requiring him to teach evolutionism not just as a theory, but rather as a fact.

Peloza's complaint is not entirely consistent. In some places he seems to advance the patently frivolous claim that it is unconstitutional for the school district to require him to teach, as a valid scientific theory, that higher life forms evolved from lower ones. At other times he claims the district is forcing him to teach evolution as fact. Although possibly dogmatic or even wrong, such a requirement would not transgress the establishment clause if "evolution" simply means that higher life forms evolved from lower ones. Peloza uses the words "evolution" and "evolutionism" interchangeably in the complaint. This is not wrong or imprecise for, indeed, they are synonyms[3]. Adding "ism" does not change the meaning nor magically metamorphose "evolution" into a religion. "Evolution " and "evolutionism" define a biological concept: higher life forms evolve from lower ones. The concept has nothing to do with how the universe was created; it has nothing to do with whether or not there is a divine Creator (who did or did not create the universe or did or did not plan evolution as part of a divine

---

3 See Webster's Third New Int'l Dictionary (G. & C. Merriam Co. Springfield, MA. 1969), p. 789 ("evolutionism: 1: a theory of evolution (as in philosophy, biology, or sociology) -- see Darwinism 2: adherence to or belief in evolution esp. of living beings").

scheme).

On a motion to dismiss we are required to read the complaint charitably, to take all well-pleaded facts as true, and to assume that all general allegations embrace whatever specific facts might be necessary to support them. Lujan v. Nat'l Wildlife Federation, 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990); Abramson v. Brownstein, 897 F.2d 389, 391 (9th Cir.1990).

Charitably read, Peloza's complaint at most makes this claim: the school district's actions establish a state-supported religion of evolutionism, or more generally of "secular humanism." See Complaint at 2-4, 20. According to Peloza's complaint, all persons must adhere to one of two religious belief systems concerning "the origins of life and of the universe:" evolutionism, or creationism. Id. at 2. Thus, the school district, in teaching evolutionism, is establishing a state-supported "religion."

We reject this claim because neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are "religions" for Establishment Clause purposes. Indeed, both the dictionary definition of religion[4] and the clear weight of the caselaw[5] are to the contrary. The Supreme Court has

---

4 According to Webster's, religion is the "belief in and reverence for a supernatural power accepted as the creator and governor of the universe." Webster's II New Riverside University Dictionary 993 (1988).

5 See Smith v. Board of School Com'rs of Mobile County, 827 F.2d 684, 690-95 (11th Cir.1987) (refusing to adopt district court's holding that "secular humanism" is a religion for Establishment Clause purposes; deciding case on other grounds); United States v. Allen, 760 F.2d 447, 450-51 (2d Cir.1985) (quoting Tribe, American Constitutional Law

held unequivocally that while the belief in a divine creator of the universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not. Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (holding unconstitutional, under Establishment Clause, Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act").

Peloza would have us accept his definition of "evolution" and "evolutionism" and impose his definition on the school district as its own, a definition that cannot be found in the dictionary, in the Supreme Court cases, or anywhere in the common understanding of the words. Only if we define "evolution" and "evolutionism" as does Peloza as a concept that embraces the belief that the universe came into existence without a Creator might he make out a claim. This we need not do. To say red is green or black is white does not make it so. Nor need we for the purposes of a 12(b)(6) motion accept a made-up definition of "evolution." Nowhere does Peloza point to anything that conceivably suggests that the school district accepts anything other than the common definition of "evolution" and "evolutionism." It simply required him as a biology teacher in the public schools of California to teach "evolution." Peloza nowhere says it required more.

The district court dismissed his claim, stating:

> Since the evolutionist theory is not a religion, to require an instructor to teach this theory is not a violation of the Establishment Clause.... Evolution is a scientific theory

---

827-28 (1978), for the proposition that, while "religion" should be broadly interpreted for Free Exercise Clause purposes, "anything 'arguably non-religious' should not be considered religious in applying the establishment clause").

> based on the gathering and studying of data, and modification of new data. It is an established scientific theory which is used as the basis for many areas of science. As scientific methods advance and become more accurate, the scientific community will revise the accepted theory to a more accurate explanation of life's origins. Plaintiff's assertions that teaching of evolution would be a violation of the Establishment Clause is unfounded.

Id. at 12-13. We agree.

B. Free Speech

Peloza alleges the school district ordered him to refrain from discussing his religious beliefs with students during "instructional time," and to tell any students who attempted to initiate such conversations with him to consult their parents or clergy. He claims the school district, in the following official reprimand, defined "instructional time" as any time the students are on campus, including lunch break and the time before, between, and after classes:

> You are hereby directed to refrain from any attempt to convert students to Christianity or initiating conversations about your religious beliefs during instructional time, which the District believes includes any time students are required to be on campus as well as the time students immediately arrive for the purposes of attending school for instruction, lunch time, and the time immediately prior to students' departure after the instructional day.

Complaint at 16. Peloza seeks a declaration that this definition of instructional time is too broad, and that he should be allowed to participate in student-initiated discussions of religious matters

when he is not actually teaching class.[6]

The school district's restriction on Peloza's ability to talk with students about religion during the school day is a restriction on his right of free speech. Nevertheless, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506-07, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969). "[T]he interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment...." Lamb's Chapel v. Center Moriches Union Free School Dist., --- U.S. ----, ----, 113 S.Ct. 2141, 2148, 124 L.Ed.2d 352 (1993) (quoting Widmar v. Vincent, 454 U.S. 263, 271, 102 S.Ct. 269, 275, 70 L.Ed.2d 440 (1981)). This principle applies in this case. The school district's interest in avoiding an Establishment Clause violation trumps Peloza's right to free speech.

While at the high school, whether he is in the classroom or outside of it during contract time, Peloza is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable

---

6 The dissent claims this interpretation impermissibly narrows the scope of Peloza's complaint. However, the very sentence quoted by the dissent, Dissent at p. 12064, focuses not on the definition of "religious matters," but on the definition of "instructional time." We agree with the dissent that a complaint must be read charitably at the Rule 12(b)(6) stage. However, a reviewing court need not go so far as to invent claims not within the reasonable intendment of the complaint.

because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. In sum, it would flunk all three parts of the test articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). See Roberts v. Madigan, 921 F.2d 1047, 1056- 58 (10th Cir.1990) (teacher could be prohibited from reading Bible during silent reading period, and from stocking two books on Christianity on shelves, because these things could leave students with the impression that Christianity was officially sanctioned), cert. denied, --- U.S. ----, 112 S.Ct. 3025, 120 L.Ed.2d 896 (1992).

The district court did not err in dismissing the part of Peloza's section 1983 claim that was predicated on an alleged violation of his right to free speech under the First Amendment.

C. Due Process

Peloza alleges that some of the defendants made defamatory statements to and about him, and that these statements damaged his reputation. He alleges this was state action which violated his right to due process under the Fourteenth Amendment.

To state a claim under 42 U.S.C. § 1983 based on an alleged violation of due process, Peloza must allege a deprivation of a life, liberty or property interest within the meaning of the Fourteenth Amendment's Due Process Clause. Board of Regents v. Roth, 408 U.S. 564, 571, 92 S.Ct. 2701, 2705-06, 33 L.Ed.2d 548 (1972). The injury Peloza alleges here is to his reputation. An injury to reputation does not deprive Peloza of any interest in life. The district court concluded that it did not deprive him of a liberty

or a property interest. Peloza concedes that his interest in his reputation is not a property interest. He argues, however, that the alleged injury to his reputation deprived him of a liberty interest sufficient to state a claim under section 1983 based on a due process violation. We disagree. In Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), the Court laid to rest the notion that reputation alone is a sufficient interest to give rise to due process rights. In that case, Siegert, a psychologist working for the federal government, resigned from his job in Washington, D.C. to avoid being fired. Id. at 227-29, 111 S.Ct. at 1791. He applied for a job in an Army hospital in Germany which required that he be "credentialed." This involved asking his former employer for information about him. Id. His former supervisor responded to the request for information with a letter which said "that he 'consider[ed] Dr. Siegert to be both inept and unethical, perhaps the least trustworthy individual I have supervised in my thirteen years [here].' " Id. The Court held that Siegert had no cause of action for deprivation of liberty under the Due Process Clause because "injury to reputation by itself was not a 'liberty' interest...." Id. at 233, 111 S.Ct. at 1794; see also Paul v. Davis, 424 U.S. 693, 712, 96 S.Ct. 1155, 1165-66, 47 L.Ed.2d 405 (1976); Cooper v. Dupnik, 924 F.2d 1520, 1532 (9th Cir.1991), cert. denied, --- U.S. ----, 113 S.Ct. 407, 121 L.Ed.2d 332 (1992); Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 17.4(d), (1992).

Like Dr. Siegert's, Peloza's allegations of injury to his reputation are insufficient to support a claim for deprivation of a liberty interest under section 1983. Peloza's citations to dicta in pre-Paul cases that suggest reputation alone is protected in this context are unavailing. The district court did not err in dismissing the part of Peloza's section 1983 claim which was predicated on an alleged violation of his right to due process under the Fourteenth Amendment.

## II
## The Section 1985(3) Claim

In support of his claim under 42 U.S.C. § 1985(3), Peloza alleges in his complaint that the defendants conspired to deprive him of equal protection of the laws under the Fourteenth Amendment; free speech under the First and Fourteenth Amendments; life, liberty "or" property without due process of law under the Fifth and Fourteenth Amendments; and the free exercise of his religious beliefs under the First and Fourteenth Amendments. In addition, he alleges the defendants violated his rights under the Establishment Clause of the First and Fourteenth Amendments. He alleges that the defendants engaged in this conspiracy pursuant to their class-based animus against practicing Christians.[7]

As we stated previously, Peloza's allegations are insufficient to support a claim based on a violation of his constitutional rights of free speech and due process. Accordingly, his allegations of a conspiracy to violate these constitutional rights do not state a claim. See Great American Fed. S. & L. Ass'n v. Novotny, 442 U.S. 366, 372, 99 S.Ct. 2345, 2349, 60 L.Ed.2d 957 (1979) ("Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates."). Because Peloza failed to allege a conspiracy to do something that would violate his free speech or due process rights, or his rights under the Establishment Clause, his section 1985(3) claim predicated on a violation of these rights fails. We do not decide whether free speech, due process rights, or Establishment

---

7 As with his equal protection claim under section 1983, Peloza appears to have dropped his equal protection claim from his appeal to this court.

Clause rights, fall within the protection of section 1985(3).[8]

III
State Law Claims

Peloza's state law claims were pendent to his federal claims and were dismissed for lack of jurisdiction when the district court dismissed all the federal claims. We affirm their dismissal.

IV
Attorney Fees

Peloza contends the district court erred in awarding the defendants costs and attorney fees of approximately $32,000. This

---

8 See United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 830, 103 S.Ct. 3352, 3357, 77 L.Ed.2d 1049 (1983) (free speech rights protected by section 1985 so long as the state is involved in the conspiracy alleged). As to due process rights, there appears to be some confusion within this circuit. Older cases have stated that section 1985(3) provides no remedy for violation of due process rights, Cohen v. Norris, 300 F.2d 24, 28 (9th Cir.1962) (dicta); Mitchell v. Greenough, 100 F.2d 184, 187 (9th Cir.1938) (holding), cert. denied, 306 U.S. 659, 59 S.Ct. 788, 83 L.Ed. 1056 (1939). In some more recent cases, we have allowed claims of due process violations to proceed under section 1985(3) without comment. See Judie v. Hamilton, 872 F.2d 919, 924 (9th Cir.1989); Padway v. Palches, 665 F.2d 965, 969 (9th Cir.1982). See Taylor v. Gilmartin, 686 F.2d 1346, 1358 (10th Cir.1982) (First Amendment freedom of religion protected by section 1985(3)), cert. denied, 459 U.S. 1147, 103 S.Ct. 788, 74 L.Ed.2d 994 and cert. denied, 463 U.S. 1229, 103 S.Ct. 3570, 77 L.Ed.2d 1411 (1983); Action v. Gannon, 450 F.2d 1227, 1234 (8th Cir.1971) (same); Cooper v. Molko, 512 F.Supp. 563, 570 (N.D.Cal.1981) (same); but see Africa v. Anderson, 510 F.Supp. 28, 30 (E.D.Penn.1980) (freedom of religion not protected by section 1985(3)).

award, made by the district court under Federal Rule of Civil Procedure 11 and 42 U.S.C. § 1988, was appropriate if Peloza's complaint is frivolous. Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412, 422, 98 S.Ct. 694, 700-01, 54 L.Ed.2d 648 (1978) (under civil rights statutes); Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir.1990) (en banc) (under Fed.R.Civ.P. 11). Peloza's complaint is not entirely frivolous. Some of the issues he raises present important questions of first impression in this circuit. His free speech claim involves substantial questions and requires the balancing of rights of free speech against the Establishment Clause, a matter upon which the Supreme Court recently commented in Lamb's Chapel. Accordingly, we reverse the district court's award of attorney fees and costs to the defendants.

## V
## CONCLUSION

The district court correctly dismissed Peloza's section 1983 claim based on allegations of a violation of his constitutional rights under the Establishment Clause and his rights to free speech and due process. He failed to allege sufficient facts to state a violation of these rights. The district court also correctly dismissed Peloza's claim under 42 U.S.C. § 1985(3), because he failed to allege facts sufficient to state a violation of those rights, assuming, without deciding, that they fall within the protection of section 1985(3).

We affirm the dismissal of the complaint. We reverse the district court's award of attorney fees to the defendants.

The parties shall bear their own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART.

POOLE, Circuit Judge, concurring in part and dissenting

in part:

I am in agreement with the majority's resolution of John Peloza's Establishment Clause and Due Process Clause claims. However, because I believe we can dismiss Peloza's free speech claims only by turning a deaf ear to the procedural posture of this case, I respectfully dissent from parts I.B and II of the majority opinion.

I

Schoolteacher John Peloza seeks a declaratory judgment permitting him to "respond[] to student-initiated inquiries ... regarding religion" during contract time. The majority opinion concludes that if Peloza's discussions would constitute an establishment of religion, the District may permissibly limit those discussions, even though such limitations restrict Peloza's free speech. With this I have no quarrel. But the majority's premise is that any discussions Peloza might have do constitute such an establishment, and I am unpersuaded that we may reach such a conclusion in the case's present posture.

This is an appeal from the granting of a Rule 12(b)(6) motion. As such, we are not permitted to affirm dismissal of the complaint "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Love v. United States, 915 F.2d 1242, 1245 (9th Cir.1989). At this stage, we know almost nothing about what past or future discussions might involve. I can imagine a wide range of circumstances and questions "regarding religion" which Peloza could permissibly answer without violating the Establishment Clause. For example, a student might come to a teacher during lunch and ask about Malcolm X or Martin Luther King's religious beliefs, and how and why they evolved, or about the origins of Islam, or what the seven great religions of the world were. Such

questions would certainly be "regarding religion," student-initiated, and during contract time. As such, they fall within the class of discussions Peloza seeks to be permitted, yet it is hard to see how the descriptive role a teacher would have in responding to these questions would work any violation of the Establishment Clause.

The majority holding only makes sense if we presume that we know what kinds of questions are being asked and what kinds of answers Peloza would give. In the posture of this case, where we must reverse if there are any facts Peloza could conceivably prove which would entitle him to relief, this is a presumption we are forbidden from making. As a result, the majority holding means that any response to a student-initiated inquiry "regarding religion" during contract time, other than "Ask someone else," works a violation of the Establishment Clause. I cannot join in such a broad legal holding, and indeed the case law forbids it:

> In each case, the inquiry calls for line-drawing; no fixed, per se rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application.... The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Lemon [v. Kurtzman ], 403 U.S. [602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745 (1971) ].

Lynch v. Donnelly, 465 U.S. 668, 678-79, 104 S.Ct. 1355, 1362, 79 L.Ed.2d 604 (1984).

Roberts v. Madigan, 921 F.2d 1047 (10th Cir.1990), upon which the majority relies, is not to the contrary. There, the court had before it a host of particulars: the conduct at issue involved a

teacher displaying religious books and a poster reading "You have only to open your eyes to see the hand of God" in the classroom. Id. at 1049. That court also had the benefit of a district court factual determination that the conduct "created the appearance that [the teacher] was seeking to advance his religious views." Id. As this case stands, we know far less.

The majority impermissibly attempts to narrow the scope of Peloza's complaint by relying on a written warning from the school district which Peloza has incorporated into the complaint. The letter forbids Peloza from "attempt[ing] to convert students to Christianity or initiating conversations about your religious beliefs." Complaint at ¶ 45. Were this all that the complaint said, I would have little trouble joining the majority. But the complaint alleges more; it contends that "the school district ... has directed Plaintiff not to discuss any religious matters during any of this 'instructional time,' including student-initiated conversations regarding religion during lunch, class breaks, and before and after school hours." Complaint at P 3. This allegation we must take as true. If all that lies behind it is the far narrower warning the majority cites, then Peloza's case will not be long for this world. But we may not presume that this is so.

I believe that, in a broad range of cases, the majority and I could agree about what would or would not constitute a violation of the Establishment Clause. But the majority errs in presuming to know that what is at stake here is Peloza's right to "discuss[ ] his religious beliefs" with students. In doing so, it ignores the fact that this is a Rule 12(b)(6) case. More generally, it gives short shrift to the possibility that we may well be limiting free speech more broadly than the state's compelling interest in avoiding an establishment of religion would warrant.

II

I join in the majority's part II insofar as it dismisses Peloza's § 1985(3) due process and Establishment Clause claims based on his failure to properly allege a violation of these rights. However, because I conclude that Peloza's free speech claim should not have been dismissed, I would also remand, rather than dismiss, his § 1985(3) claim based on alleged free speech violations.

III

Religion has been used to justify the suppression of speech for centuries. See Everson v. Board of Ed., 330 U.S. 1, 8-10, 67 S.Ct. 504, 507-09, 91 L.Ed. 711 (1947). With the development of a vigorous First Amendment jurisprudence, we have quelled some of the worst abuses. But points of tension remain. We must thus remain vigilant to ensure that in our rush to preserve certain fundamental rights, we do not trample others. Caution is of the essence; only through a methodical and fact-specific jurisprudence can we hope to achieve a proper accommodation.

For the reasons stated above, I respectfully dissent.

[Decided Nov. 25, 1994.]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| JOHN E. PELOZA, | ) | No. 92-55228 |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | D.C. No. CV-91-5268-DWW |
| v. | ) | |
| | ) | |
| CAPISTRANO UNIFIED SCHOOL DISTRICT, et al. | ) | ORDER |
| | ) | |
| | ) | |
| Defendants-Appellees. | ) | |

---

Before: FLETCHER, POOLE and THOMPSON, Circuit Judges.

A majority of the panel in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Pool voted to grant rehearing before the panel.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[counsel names and addresses omitted]
[caption omitted]

PLAINTIFF'S COMPLAINT AND APPLICATION FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff JOHN E. PELOZA, by and through his attorney Cyrus Zal of The Rutherford Institute of California, complains of the Defendants and alleges as follows:

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief and for damages, arising out of a controversy and dispute between Plaintiff, who is a biology teacher in a public high school, and the school district which employs him. The controversy and dispute arise from Plaintiff's method of teaching on the subject of the origins of life and of the universe. There are basically two world views on the subject of the origins of life and of the universe: the belief system of evolutionism is based on the assumption that life and the universe evolved randomly and by chance and with no Creator involved in the process. The world view and belief system of creationism is based on the assumption that a Creator created all life and entire universe. More particularly, the belief system of evolutionism, also known as macro-evolution, postulates that the "higher" life forms, such as human beings, evolved from the "lower" life forms, such as the one-celled amoeba and that life itself "evolved" from non-living matter. The belief system of creationism, on the other hand, postulates that none of the life forms evolved from any of the other life forms, but appeared abruptly as separate and distinct life forms and that there has never been any evolution of one life form into a distinctly different life form. Both evolutionism and creationism are religious belief systems in that the underlying assumptions or postulates that each belief is based upon occurred in the non-observable and non-

recreatable past and hence are not subject to scientific observation. Thus evolutionism, as well as creationism, both represent historical, philosophical, and religious belief systems, and neither one is a valid scientific theory. In this action, plaintiff is not seeking either "balanced treatment" or "equal time" in the classroom for the religious belief system of creationism. Plaintiff is seeking to be free from pressure from defendants, who are seeking to force plaintiff into the proselytizing of evolutionism upon his students under the guise of a valid scientific theory. Plaintiff desires his classroom to be void of the imposition of any philosophical and religious belief systems, including evolutionism and creationism, presented under the guise of science. Plaintiff seeks the freedom to teach his students to differentiate between a philosophical, religious belief system on the one hand and a true scientific theory on the other, and further seeks to teach his students the difference between indoctrination and education. The religious belief system of evolutionism and creationism clearly conflict with each other in their philosophies: Plaintiff desires not to promote either philosophy or belief system in teaching his biology class. Defendants are pressuring Plaintiff to present the religious belief system of evolutionism as a valid scientific theory: however, evolutionism cannot be directly observed or re-created in the laboratory in a scientific manner and hence it is not a valid scientific theory. Defendants cannot provide valid scientific evidence to support the religious belief system of evolutionism. Defendants are attempting to disguise the philosophical and religious belief system of evolutionism as a valid scientific theory and are pressuring Plaintiff to teach it as a valid scientific theory and Plaintiff is resistant to this attempt by Defendants to teach the religious belief system of evolutionism as a valid scientific theory. It is Plaintiff's position that forcing him to teach the religious belief system of evolutionism as a valid scientific theorywould force him to become an unwilling agent of the school district in the establishment of the religion of secular humanism, in violation of the First Amendment to the United States Constitution. The

general acceptance of the religious belief system of evolutionism in academic circles does not qualify if or validate it as a valid scientific theory. Plaintiff seeks to vindicate, among other rights, his First Amendment rights to freedom of speech and to academic freedom to teach the truth in the classroom, and to teach science in the classroom, and the academic freedom rights of his students to be taught the truth.

2. Defendants have conspired to deny Plaintiff his First, Fifth and Fourteenth Amendment rights by engaging in actions designed to destroy and damage plaintiff's professional reputation, career, and position as a public high school teacher. Plaintiff believes that defendants seek to dismiss him from his position as a public high school teacher due to plaintiff's refusal to teach the religious belief system of evolutionism as a valid scientific theory. Plaintiff also believes that Defendants have engaged in conspiracy to deny him his First, Fifth and Fourteenth Amendment rights on the basis of his religious faithof Christianity.

3. Finally, the school district has defined "instructional time" as encompassing the entire time that plaintiff is on the school campus and has directed plaintiff not to discuss any religious matters during any of this "instructional time," including student-initiated conversations regarding religion during lunch, class breaks, and before the after school hours. Plaintiff seeks a declaration that under his First Amendment rights he is entitled to privately discuss religion in conversations initiated by students during private, non-instructional time on the school campus.

## THE PARTIES

4. Plaintiff is a resident and citizen of the City of Dana Point, Orange County, California.

5. Defendant CAPISTRANO UNIFIED SCHOOL DISTRICT (hereinafter "Defendant SCHOOL DISTRICT") is an independent school district, organized and existing under the

Constitution and the laws of the State of California, for public secondary school purposes, and is managed, governed and controlled by Defendant BOARD OF TRUSTEES OF THE CAPISTRANO UNIFIED SCHOOL DISTRICT (hereinafter "Defendant BOARD OF TRUSTEES").

6. Defendants PAUL B. HASEMAN, CRYSTAL KOCHENDORFER, MARLENE M. DRAPER, ANNETTE B. GUDE, KATHRYN I. ITZEL, E.G. KOPP, and A. EDWARD WESTBERG, are members of the Board of Trustees of Defendant SCHOOL DISTRICT. These named Defendants are all residents of Orange County, California, and are sued in their official capacities only.

7. Defendant JEROME R. THORNSLEY (hereinafter "Defendant THORNSLEY"), a resident of Orange County, California, was, at certain times relevant to the matters alleged in this complaint, the Superintendent of Defendant SCHOOL DISTRICT and is sued in his individual and official capacity.

8. Defendant WILLIAM D. ELLER (hereinafter "Defendant ELLER"), a resident of Orange County, California, is the Assistant Superintendent, Instructional Operations, of Defendant SCHOOL DISTRICT and is sued in his individual and official capacity.

9. Defendant GERALDINE JAFFE (hereinafter "Defendant JAFFE"), a resident of Orange County, California, is an attorney employed by the Orange County Department of Education and is sued in her individual and official capacity.

10. Defendant THOMAS R. ANTHONY (hereinafter "Defendant ANTHONY"), a resident of Orange County, California, is the Principal of Capistrano Valley High School and is sued in his individual and official capacity.

11. Defendant ROSS VELDERRAINE (hereinafter "Defendant VELDERRAINE") a resident of Orange County, California, is the Vice Principal of Capistrano Valley High School and is sued in his individual and official capacity.

12. Defendant JAMES CORBETT (hereinafter

"Defendant CORBETT") a resident of Orange County, California, is a teacher at Capistrano Valley High School and is sued in his individual and official capacity.

13. Defendant PAUL PFLUEGER (hereinafter "Defendant PFLUEGER") a resident of Orange County, California, is a teacher at Capistrano Valley High School and is sued in his individual and official capacity.

14. Defendant RAY PANICI (hereinafter "Defendant PANICI") a resident of Orange County, California, is a teacher at Capistrano Valley High School and is sued in his individual and official capacity.

15. Defendant TIM DUNN (hereinafter "Defendant DUNN") a resident of Orange County, California, is a teacher at Dana Hills High School and is sued in his individual and official capacity.

16. Defendant WILLIAM REDDING (hereinafter "Defendant REDDING") a resident of Orange County, California, is a teacher at Capistrano Valley High School and is sued in his individual and official capacity.

17. Plaintiff is informed and believes and thereupon alleges that at all times mentioned herein, except where alleged to the contrary, Defendants, and each of them, were acting for and on behalf of the other Defendants as their agents, servants, representatives and/or employees and all acts, conduct, and omissions herein alleged were perpetrated while said Defendants were acting within the authorized course and scope of said agency or employer.

18. Plaintiff is informed and believes and thereupon alleges that at all times mentioned herein, except where alleged to the contrary, Defendants, and each of them, were the agents, servants, representatives and/or employees of the remaining Defendants and were at all times material hereto acting within the authorized course, scope of and purpose of said agency and employer and/or that all of said acts were subsequently ratified by the respective principals and benefits thereof accepted by said

principals.

19. Plaintiff is ignorant of the true names and capacities of Defendants DOES 1 through 200, inclusive, and therefore sues said Defendants by such fictitious names. Plaintiff will seek leave of the court to amend this complaint to include the true names and capacities of said Defendants when they have been ascertained. Plaintiff is informed and believes and thereon alleges that each of the Defendants fictitiously named herein as DOE is legally responsible, negligently or in some other actual manner, for the events and happenings hereinafter referred to and thereby proximately caused the injuries and damages to the Plaintiff as hereinafter alleged.

20. Whenever the term "DEFENDANTS" is used, it includes all named Defendants and all DOES.

## JURISDICTION AND VENUE

21. This Court has jurisdiction of the subject matter of this action under 28 U.S.C. Section 1331 in that Plaintiff alleges violations of Federal law, particularly the First, Fifth, and Fourteenth Amendments to the United States Constitution. In addition, jurisdiction is proper under42 U.S.C. Section 1981, 1983, 1985(3), 28 U.S.C. Section 1343 and the doctrine of pendent jurisdiction. Declaratory relief is authorized by 28 U.S.C. Sections 2201 and 2202 and Rule 57, Federal Rules of Civil Procedure.

22. Venue in this District is proper under 28 U.S.C. Section 1391(b) because the claims arise here.

## FACTS COMMON TO ALL CAUSES OF ACTION

23. Plaintiff hereby realleges paragraphs 1 through22 and incorporates them herein as though set forth in full.

24. Within one year after sustaining the damages hereinafter alleged, the Plaintiff presented a written claim to Defendant SCHOOL DISTRICT pursuant to Government Code

Section 910 *et. seq.*

25. After the claim was filed but less than 6 months prior to the filing of the lawsuit, Defendant SCHOOL DISTRICT rejected the Plaintiff's claim in its entirely.

26. On or about February 7, 1991, Defendant ANTHONY issued a formal written reprimand to Plaintiff, wrongly accusing Plaintiff of proselytizing students in the classroom and wrongly accusing Plaintiff of teaching religion in the classroom. The formal written reprimand incorporated a letterdated October 11, 1990, from Defendant VELDERRAINE to Plaintiff. The entire contents of the February 7, 1991 written reprimand and the October 11, 1990 letter from Defendant VELDERRAINE to Plaintiff are incorporated herein as giving rise to Plaintiff's cause of action as stated below.

27. On or about February 12, 1991, Defendant ANTHONY wrote a letter to Plaintiff in response to Plaintiff's inquiry to Defendant ANTHONY regarding whether or not Defendant SCHOOL DISTRICT was directing Plaintiff to teach evolution as "fact." Defendant ANTHONY failed and refused to give a direct answer to Plaintiff's said inquiry.

28. On or about February 13, 1991, or February 14, 1991, Plaintiff wrote a letter to Defendant ANTHONY requesting written clarification regarding whether Defendant SCHOOL DISTRICT was directing Plaintiff to teach evolution as the only valid scientific theory. On or about February 19, 1991, Defendant ANTHONY, in response to Plaintiff's inquiry, failed and refused to give a direct and valid response to Plaintiff's said inquiry.

29. On or about February 25, 1991, Defendant ANTHONY wrote a memorandum to Plaintiff regarding the use of school letterhead and teacher's mailboxes. The Memorandum stated that "past practice has been that all materials distributed must either be approved by school administration or District administration. Also, the use of school letterhead is inappropriate unless you have my permission." Plaintiff is informed and believes, and thereupon alleges, that other teachers have been allowed to

distribute materials in the teachers' mailboxes without prior school administration or District administration approval and that other teachers have used the school letterhead without the permission of Defendant ANTHONY.

30. On various dates beginning on or about February 7, 1991, and including March 11, 1991, and continuing on various dates after that, Defendant ANTHONY spoke in person and by telephone to various individuals, including CATHY BERGESON, regarding Plaintiff. Defendant ANTHONY spoke to CATHY BERGESON on March 11, 1991, regarding Plaintiff. Defendant ANTHONY made statements to these individuals, including CATHY BERGESON, which are summarized and paraphrased as follows: "Creation should not be taught in a Biology class. The issue is not Creation but a personnel problem with Plaintiffthat has existed for years, involving the way Plaintiff has been conducting himself during school hours. An incident had occurred in the classroom between Plaintiff and a student. It was not a sexual encounter but details cannot be revealed because it is a personnel problem." Plaintiff denies that he has ever taught religion creationism in his class.

31. On or about March 15, 1991, Defendant ANTHONY wrote a Memorandum to Plaintiff regarding Plaintiff's informal grievance of alleged violations of the Collective Bargaining Agreement existing between Plaintiff's Union and Defendant SCHOOL DISTRICT. In the Memorandum dated March 15, 1991, from Defendant ANTHONY to Plaintiff, Defendant ANTHONY wrongly asserted that the Collective Bargaining Agreement had not been violated by Defendant SCHOOL DISTRICT in the issuing of the formal written reprimand to Plaintiff dated February 7, 1991.

32. On or about March 15, 1991, Defendant ANTHONY wrote a Memorandum to Plaintiff regarding Plaintiff's inquiries he had made of Defendant ANTHONY on March 15, 1991. The Memorandum of Defendant ANTHONY dated March 15, 1991, was a complete stonewall of questions that Plaintiff had

asked Defendant ANTHONY and Defendant ANTHONY purported not to know what terms such as "outside instructional time," or "origins," or "macro-evolution" meant. The entire content of Defendant ANTHONY's Memorandum to Plaintiff dated March 15, 1991, are incorporated herein.

33. On or about April 10, 1991, Defendant ANTHONY stated to Mr. Schmitch that he very much wanted Plaintiff to lose his job.

34. On or about April 10, 1991, Defendant PFLUEGER, who is a teacher at Capistrano Valley High School, gave the following question as a test to his students: "Why is Mr. Peloza's [the Plaintiff] reasoning that his First Amendment freedom of speech is being taken away off base?" The students were required by Defendant PFLUEGER to write an answer during class time and in the classroom.

35. On or about February 16, 1991, a story was published in the Orange County Register, a newspaper of general circulation, in which Defendant ANTHONY was stated to be the source of the following information: 1) that Plaintiff had been reprimanded and advised to teach according to school district guidelines; 2) that the school district was continuing to monitor Plaintiff, partly to build a case for a possible dismissal hearing; and 3) that it was not Plaintiff's right to not teach what he was employed to teach in the school district.

36. In the above-referenced February 16, 1991 news story, Defendant PANICI a teacher at Capistrano Valley High School, was stated to be the source of the following information: 1) that Plaintiff was hurting his students; and 2) that Plaintiff's teaching in the evolution unit did not belong in the classroom.

37. In the above-referenced February 16, 1991 news story, Defendant DUNN, a teacher at Dana Hills High School, was stated to be the source of the following information: that Plaintiff was out to discredit evolution theory in order to support creationism.

38. On or about March 7, 1991, a story was published

in the Orange County Register, in which Defendant THORNSLEY was stated to be the source of the following information: 1) that Plaintiff was being investigated for teaching "creationism;" 2) that Plaintiff was being investigated for trying to convert non-Christians to Christianity; and 3) that Plaintiff had been reprimanded and eventually could face dismissal if he did not adjust his teaching.

39. On or about March 15, 1991, an article entitled "Opinion: Religion Dominates Science in Peloza's Classroom" was published in Paw Prints, the Capistrano Valley High School newspaper. Defendant CORBETT is the faculty advisor for Paw Prints. The article wrongly accused Plaintiff of teaching religion in his science class.

40. On or about April 2, 1991, a story was published in the Los Angeles Times, Orange County Edition, a newspaper of general circulation, in which Defendant ELLER, the assistant superintendent for instructional operations, was stated to be the source of the following information: 1) that if a teacher [referring to Plaintiff] constantly refutes evolution while referring to an alternative religious perspective, then that is clearly a violation of the state framework and clearly inappropriate, because of the First Amendment's requirement that church and state be separated; and 2) that Plaintiff's theories do not meet scientific standards.

41. In the above-referenced story of April 2, 1991, Defendant JAFFE, an attorney for the Orange County Department of Education, was stated to be the source of the following information: 1) that despite Plaintiff's denials, he was teaching creationism; 2) that creationism is not a scientific theory, it is a religious belief; and 3) that it is inappropriate to teach religion in a science class.

42. On or about May 13, 1991, Defendant ANTHONY issued a formal written reprimand to Plaintiff, wrongly accusing Plaintiff of proselytizing students in the classroom and wrongly accusing Plaintiff of teaching religion in the classroom. The written reprimand also directed Plaintiff as follows: "If a student does ask you a question about religion, you are directed to refer

them to their parents or to their own clergy person for guidance." The written reprimand also stated:

> "You are further directed to teach evolution as a valid scientific theory and to refrain from any teaching of creationism as a valid scientific theory . . . your refusal to teach evolution can be construed to constitute persistent failure to obey local and state [sic]

43. On or about May 13, 1991, Defendant ANTHONY issued a formal written warning to Plaintiff, in which it was stated:

> "You are hereby directed to refrain from any attempt to convert students to Christianity or initiating conversations about your religious beliefs during instructional time, which the District believes includes any time students are required to be on campus as well as the time students immediately arrive for the purposes of attending school for instruction, lunch time, and the time immediately prior to students' departure after the instructional day. Please be advised that should you fail to comply with these written directives or should there be any additional incidents of this kind, further disciplinary action will be considered."

44. On or about May 23, 1991, Plaintiff was in the teacher's lounge. On that date, Defendant CORBETT dropped a piece of paper on the table and commented to Plaintiff: "Congratulations on receiving your M.S. in biology." Defendant CORBETT then walked away.

45. Also on or about May 23, 1991, Defendant REDDING, in the presence of Plaintiff's students as they were entering Plaintiff's class, made the following remarks to Plaintiff: "John, I consider this offensive when you say you have an M.S. in biology and you do not. John, you are dishonest." Defendant REDDING was holding out a piece of paper while making these remarks to Plaintiff. The piece of paper was an event program which had mistakenly stated that Plaintiff had an M.S. in biology. At the event in question, an announcement was made to the audience that the program had mistakenly listed Plaintiff's master's

degree to be in biology rather than in physical education. Both Defendant CORBETT and Defendant REDDING were aware that an announcement had been made correcting the mistake in the program at the time the above-described incidents took place.

46. Also on or before May 23, 1991, Defendant REDDING wrongly harassed Plaintiff in the teacher's lounge regarding the event program which had mistakenly stated that Plaintiff had an M.S. in biology.

47. On various dates in 1991, Defendant PFLUEGER, a teacher at Capistrano Valley High School, has continually criticized Plaintiff to his students and has proselytized his students against Plaintiff in the classroom regarding the matters which are the subject of this action. Defendant PFLUEGER has encouraged his students to write letters to newspapers criticizing Plaintiff and has offered his students extra credit for having their letters of criticism regarding Plaintiff published in the Los Angeles Times, a newspaper of general circulation.

48. On or about May of 1991, Plaintiff received an evaluation report from the Capistrano Unified School District for the report period of 1990 to 1991. The evaluation report was unsigned and undated. The evaluation report contained "needs improvement" and "unsatisfactory" evaluations of Plaintiff that were not substantiated by any first-hand evidence but were based on Defendants' desire to pressure Plaintiff into teaching the religious belief systems of evolutionism as a valid scientific theory. The evaluation report is also evidence of discrimination against Plaintiff based on his religion of Christianity.

49. On or about June 14, 1991, an article entitled "Editorial: Show Cougar Courage" was published in Paw Prints, the Capistrano Valley High School newspaper. Defendant CORBETT is the faculty advisor for Paw Prints. The editorial represented an attempt and an invitation by Defendants to enlist the entire student body in the conspiracy to destroy and damage Plaintiff's professional reputation, career, and position as a teacher.

50. On or about June 13, 1991, and other dates in 1991,

Defendant PANICI, a teacher at Capistrano Valley High School, circulated a petition among faculty members at Capistrano Valley High School for them to sign, which stated:

> WE, the undersigned faculty members, find the intimidation tactics employed by Mr. Peloza and his attorney(s) to be repugnant and deleterious to the atmosphere of educational freedom at Capistrano Valley High School.
>
> WE strongly oppose the threat of litigation over the rights of faculty members to speak freely to the news media and each other.
>
> WE strongly support the rights of Mr. Peloza and all faculty members to espouse their opinions in all forums of discussion outside of the classroom.
>
> WE equivocally support our fellow faculty member's, named in the claim filed against the district, right to free speech outside of the classroom. They nor any of us should become potential victims in a law suit [sic] by exercising their inalienable rights."

FIRST CAUSE OF ACTION

(Violation of Federal Rights Under Section 1983
Title 42 of United States Codes
Against all Defendants)

51. Plaintiff hereby realleges paragraphs 1 through 50, and incorporates them herein as though set forth in full.

52. This cause of action arises out of the United States Constitution, particularly under the provisions of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States, and under Federal law, particularly Title 42 of the United States Code, Section 1983. Each and all of the acts of Defendants alleged herein in paragraph 23 through 50 above in depriving and conspiring to deprive Plaintiff of his First, Fifth, and Fourteenth Amendment rights by pressuring and requiring him to teach

evolutionism, a religious belief system, as a valid scientific theory, were done by Defendants, and each of them, not only as individuals, but under the color and pretense of the statutes, ordinances, regulations, customs, policy and usages of Defendant SCHOOL DISTRICT, and under the authority of their office as administrators and employees for such school district.

53. Plaintiff is informed and believes and thereupon alleges that Defendant SCHOOL DISTRICT's customs, policy and usages with respect to Plaintiff was to have Defendants deprive and conspire to deprive Plaintiff of his First, Fifth, and Fourteenth Amendment rights by the acts alleged in paragraphs 23 through 50 above by pressuring and requiring him to teach evolutionism, a religious belief system, as a valid scientific theory.

54. The conduct of Defendants, and each of them, as alleged herein, deprived Plaintiff of the following rights, privileges and immunities secured to him by the Constitution of the United States.

(A) The right of Plaintiff to be free from being forced by Defendant SCHOOL DISTRICT to be an agent for the establishment of the religious belief system of evolutionism and secular humanism under the First and Fourteenth Amendments to the Constitution of the United States;

(B) The right of Plaintiff to freedom of speech and academic freedom under the First and Fourteenth Amendment to the Constitution of the United States;

(C) The right of Plaintiff not to be deprived of life, liberty, or property without due process of law under the Fifth and Fourteenth Amendments of the United States Constitution; and

(D) The right of Plaintiff to the equal protection of the laws, secured by the Fourteenth Amendment to the Constitution of the United States.

55. As a proximate result of the aforedescribed conduct of the Defendants, and each of them, Plaintiff has suffered shock and injuries to his nervous system, all of which injuries have caused and continue to cause Plaintiff great mental and nervous

pain and suffering, and Plaintiff was further deprived of this United States Constitutional substantive rights of speech, religion, due process, and equal protection, all to his general damage in a sum which will be stated according to proof at trial.

56. The acts of Defendant, and each of them, with the exception of Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES, were willful, wanton, malicious, oppressive, and designed to injure Plaintiff, and justify an award of exemplary damages against all Defendants except Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES.

SECOND CAUSE OF ACTION
(Violation of Federal Rights Under Section 1985
Title 42 of United States Codes
Against all Defendants)

57. Plaintiff hereby realleges paragraphs 1 through 56 and incorporates them herein as though set forth in full.

58. This cause of action arises out of the United States Constitution, particularly under the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, and under Federal law, particularly Title 42 of the United States Code, Section 1985. Each and all of the acts of Defendants alleged herein in paragraphs 23 through 50 in depriving and conspiring to deprive Plaintiff of his First Amendment rights by pressuring and requiring him to teach evolutionism, a religious belief system, as a valid scientific theory, were done by Defendants, and each of them, not only as individuals, but under the color and pretense of the statutes, ordinances, regulations, customs, policy and usages of Defendant SCHOOL DISTRICT, and under the authority of their office as administrators and employees for such school district.

59. Plaintiff is informed and believes and thereupon alleges that Defendant SCHOOL DISTRICT's customs, policy and usages with respect to Plaintiff was to have Defendants deprive and conspire to deprive Plaintiff of his First, Fifth, and Fourteenth

Amendment rights by the acts alleged in paragraphs 23 through 50 above by pressuring and requiring him to teach evolutionism, a religious belief system, as a valid scientific theory.

60. Plaintiff is informed and believes, and thereupon alleges, that Defendants, and each of them, have engaged in acts of abuse, harassment, defamation, and intimidation by the alleged acts in paragraphs 23 through 50 above because Plaintiff belongs to the class of individuals who are practicing Christians and who refuse to accept the world view and religious belief system of evolutionism. Defendants, and each of them, harbor ill-will and malice against Plaintiff because he belongs to the said class of persons.

61. In or about 1990 and 1991, and within one year of the filing of this action, Defendants, and each of them, entered into an Agreement or mutual understanding with each other and with others presently unknown to Plaintiff, whereby they would seek to harass, intimidate, abuse, and defame Plaintiff and otherwise interfere with the liberty of, and otherwise deny equal protection of the laws, to Plaintiff.

62. In furtherance of the said conspiracy, Defendants committed the overt acts alleged above in paragraphs 23 through 50, among others.

63. As a direct and proximate result of said conspiracy, Plaintiff has suffered injuries and damages alleged below in violation of 42 U.S.C. Section 1985.

64. The conduct of Defendants, and each of them, as alleged herein, deprived Plaintiff of the following rights, privileges and immunities secured to him by the Constitution of the United States:

(A) The right of Plaintiff to be free from being forced by Defendant SCHOOL DISTRICT to be an agent for the establishment of the religious belief system of evolutionism and secular humanism under the First and Fourteenth Amendments to the Constitution of the United States;

(B) The right of Plaintiff to freedom of speech

and academic freedom under the First and Fourteenth Amendments to the Constitution of the United States;

(C) The right of Plaintiff not to be deprived of life, liberty, or property without due process of law under the Fifth and Fourteenth Amendments of the United States Constitution; and

(D) The right of Plaintiff to the equal protection of the laws, secured by the Fourteenth Amendment to the Constitution of the United States.

65. As a proximate result of the aforedescribed conduct of the Defendants, and each of them, Plaintiff has suffered shock and injuries to his nervous system, all of which injuries have caused and continue to cause Plaintiff great mental and nervous pain and suffering, and Plaintiff was further deprived of this United States Constitutional substantive rights of speech, religion, due process, and equal protection, all to his general damage in a sum which will be stated according to proof at trial.

66. The acts of defendants, and each of them, with the exception of Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES, were willful, wanton, malicious, oppressive and designed to injure Plaintiff, and justify an award of exemplary damages against all Defendants except Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES.

## THIRD CAUSE OF ACTION
(Injunctive Relief Against All Defendants)

67. Plaintiff hereby realleges paragraphs 1 through 66 and incorporates them as thought set forth in full.

68. Plaintiff hereby requests this court for a preliminary and permanent injunction to grant him injunctive relief to prevent the immediate and irreparable injury, loss or damage that will result in Defendants continue to violate Plaintiff's rights, privileges, and immunities secured to him under the First, Fifth and Fourteenth Amendments to the United States Constitution by the acts alleged above. Plaintiff has no adequate remedy at law for

Defendants' violation of these rights.

FOURTH CAUSE OF ACTION
(Declaratory Relief)
(Against All Defendants)

69. Plaintiff hereby realleges paragraphs 1 through 68 and incorporates them herein as though set forth in full.

70. Plaintiff further invokes the jurisdiction of this Court pursuant to the Federal Declaratory Judgment Acts and ask this Court to order, adjudge and declare that the Defendants' actions in requiring Plaintiff to teach the religious belief system of evolutionism as a valid scientific theory violates the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Acts of 1881. Plaintiff further seeks to be awarded his costs and reasonable attorneys fees necessarily incurred in pursuing this action pursuant to the Federal Declaratory Judgment Act and 42 U.S.C. Section 1988.

FIFTH CAUSE OF ACTION
(Violation of the Tom Bane Civil Rights Acts)
(Against All Defendants)

71. Plaintiff hereby realleges paragraphs 1 through 70 and incorporates them herein as though set forth in full.

72. The acts of Defendants, as alleged above in paragraph 23 through 50, jointly and individually violate the Tom Bane Civil Rights Act as codified in California Civil Code Section 52.1 in Defendants have, by threat, intimidation or coercion, interfered with or attempted to interfere with Plaintiff's exercise and/or enjoyment of rights secured by the Constitution and laws of the United States and the Constitution and laws of the State of California.

73. As a result of the aforesaid actions by Defendants, Plaintiff has suffered damages in an amount to be determined by

proof at trail. Defendants' actions, with the exception of Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES were willful and malicious. Thus, Plaintiff is entitled to punitive damages from all Defendants except Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES.

SIXTH CAUSE OF ACTION
(Intentional Infliction of Emotional Harm)
(Against All Defendants)

74. Plaintiff hereby realleges paragraph 1 through 73 and incorporates them as though set though set forth in full.

75. The actions of Defendants, jointly and individually, constitute tortious intentional infliction of emotional harm on Plaintiff.

76. As a result of the aforesaid actions by Defendants, Plaintiff has suffered damages in an amount to be determined by proof at trail. Defendants, action, with the exception of Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES, were willful and malicious. Thus, Plaintiff is entitled to punitive damages against all defendants except Defendants SCHOOL DISTRICT and BOARD OF TRUSTEES.

PRAYER

WHEREFORE, Plaintiff prays judgment against Defendants, together with costs, fees and disbursements of this action as follows:

1. Declaring that Defendants' conduct complained of is violative of Plaintiff's First, Fifth, and Fourteenth Amendment rights under the United States Constitution:

2. Declaring that Defendants' conduct complained of is violative of Plaintiff's right under California Civil Code Section 52.1 to be free from threat, intimidated or coercion in exercise or enjoyment of rights secured to all persons:

3. Granting Plaintiff a preliminary and permanent injunction restraining and enjoined the Defendants, the officers, directors, agents and representatives of Defendants, and all other persons whomsoever, known or unknown, acting on their own behalf or in concert with them, in any manner or by any means from:

A. Depriving Plaintiff of his First, fifth, and Amendments rights under the United States Constitution to freedom of speech, academic freedom, freedom of religion, due process and equal protection of the law by requiring Plaintiff to teach the religious belief system of evolutionism as a valid scientific theory;

B. Depriving Plaintiff of his First, Fifth, and Fourteenth Amendment rights under the United States Constitution to freedom of speech, academic freedom, freedom or religion, due process and equal protection of the laws by prohibiting Plaintiff from responding to student-initiated inquiries to Plaintiff regarding religion during non-instructional time on the school campus,

4. Granting general, compensatory and punitive damages;

5. Granting Plaintiff's reasonable attorney's fees, pursuant to, among other things, 42 U.S.C. Section 1988; and

6. Granting such other and further relief as the Court deems just and proper.

DATED: September 30, 1991

[signature block omitted]

DEMAND FOR JURY TRAIL [sic]

The Plaintiff in the above-entitled action requests a trail by jury as provided by Amendment VII of the United States Constitution and by Rule 38 of the Federal Rules of The Civil Procedure.

Dated: September 30, 1991

[signature block omitted]